THE

LAW

OF

CONTRACTS:

A Course of Lectures,

BY

JOHN WILLIAM SMITH, ESQ.

AUTHOR OF "LEADING CASES," ETC.

WITH NOTES AND APPENDIX,

BY JELINGER C. SYMONS, ESQ.

THIRD AMERICAN EDITION,

WITH ADDITIONAL NOTES AND REFERENCES TO BOTH ENGLISH AND AMERICAN DECISIONS,

BY WILLIAM HENRY RAWLE,

AUTHOR OF "A TREATISE ON COVENANTS FOR TITLE."

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ADVERTISEMENT

TO THE THIRD AMERICAN EDITION.

THE following Lectures exhibit, it is believed, the best characteristics of the mind of their author. In this edition of them, I have attempted to illustrate somewhat more fully the subjects which are there so clearly treated of, and to point out the harmony and the differences of the English and American decisions down to the present time.

WM. HENRY RAWLE.

PHILADELPHIA, January, 1853.

PREFACE

TO THE ENGLISH EDITION.

THE following Lectures on Contracts were comprised in a Course delivered by the author to a class of students at the Law Institution, and were designed to explain the elements of the Law of Contracts. They embody the chief *Principles* of that branch of the law; and it is trusted that they will be found equal to any of the former productions of the author, for that clear, concise, and comprehensive exposition of his subject, which has characterized his works and insured the vitality of his reputation. It appears to have been the aim of Mr. Smith to popularize a branch of law which peculiarly affects the ordinary business of life; to divest it of the superfluities with which it is often encumbered; to educe the great maxims by which it is moulded; to free it from the meshes of technicality, and to unravel the perplexity in which an occasional conflict of judgments had from time to time involved it. In so doing, he has used Cases, not as the body of the work, after the fashion of modern text-books, but

for the subordinate purpose of illustrating the spirit of the law.

The Lectures brought down the modifications introduced by late decisions to the Twelfth Volume of "Adolphus and Ellis's Reports;" and, consequently, left many points unnoticed which have been elucidated or altered by subsequent judgments. The recent growth of Public Companies, and the rapid development of commercial enterprise, have likewise combined to render the Lectures written in 1842 to this extent imperfect now. It fell to the lot of the editor to supply this deficiency. Notes and an Appendix have been consequently added; it being obviously essential that the text of the Lectures should be given to the public precisely as they were delivered by their lamented author.

The editor does not presume to hope that in these additions he has carried out the scheme of the author, or approached the inimitable style of the text. He humbly claims credit alone for an earnest endeavour to collect and annex the requisite additions to the Lectures with the utmost expedition, in order to present another work by John William Smith, with the least delay, to the profession which already ranks him as among the most gifted of its writers, and most learned of modern lawyers.

J. C. S.

ABERYSTWITH, Nov. 20, 1846.

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Barbour,	New York.
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Yeates, . . . Pennsylvania.
Yerger, ... Tennessee.
Zabriskie, . . . New Jersey.

TABLE OF ABBREVIATIONS

TO ENGLISH CITATIONS USED IN THIS WORK.

A. & E. or Ad. & Ell.,	Adolphus & Ellis.
Al.,	Alleyn.
Anst.,	Anstruther.
Atk.,	Atkyns.
B. & A. or B. & Ad.,	Barnewell & Adolphus.
B. & Ald.,	Barnewell & Alderson.
B. & B.,	Broderick & Bingham.
B. & C. or B. & Cr.,	Barnewell & Creswell.
Beav.,	Beavan.
Bl.,	Blackstone.
Bligh, N. S.,	Bligh's New Series.
B. N. C. or Bing. N. C.,	Bingham's New Cases.
Bos. & Pul.,	Bosanquet & Puller.
Bull. N. P.,	Buller's Nisi Prius.
Bulst.,	Bulstrode.
Burr.,	Burrows.
Camp.,	Campbell.
Car. & Kir.,	Carrington & Kirwan.
Car. & M.,	Carrington & Marshman.
Car. & P.,	Carrington & Payne.
Carth.,	Carthew.
C. B.,	Common Bench Reports (Man. Gr. & Scott.)[1]
Chit.,	Chitty's Reports.
Cl. & Fin.,	Clark & Finelly.
Co.,	Coke's Reports.
Cowp.,	Cowper's Reports.
Cro. Eliz.,	Croke temp. Elizabethi.
Cro. Jac.,	Croke temp. Jacobi.
Cr. & J.,	Crompton & Jervis.
Cr. & M. or Cr. & Mee.,	Crompton & Meeson.
Cr. M. & R.,	Crompton, Meeson, & Roscoe.
D. & E.,	Durnford & East, or Term Reports.
Doug. or Dougl.,	Douglas.
Dowl.,	Dowling.
Dowl. N. S.,	Dowling's New Series.
Dy.,	Dyer.
E. or East,	East's Reports.
Esp.,	Espinasse.
Exch.,	Exchequer (Wels. Hurls. & Gord.)
Fost., C. L.,	Foster's Crown Law.

[1] When the last change took place in the reporters of the three principal common law courts in England,—the Queen's Bench, Exchequer, and Common Pleas,—a change was also made in the title of the Reports—those of the new series of Adolphus & Ellis, in the Queen's Bench, commencing at Hilary Term, 1841, being cited as "Queen's Bench Reports"—those of Welsby, Hurlstone, and Gordon, in the Exchequer, commencing at Trinity Term, 1847, and succeeding those of Meeson and Welsby, being cited as "Exchequer Reports"—and those of Manning, Granger, and Scott, commencing at Hilary Term, 1845, and succeeding those of Manning and Granger, being cited as "Common Bench Reports."

Hare,	Hare's Reports.
H. Bl.,	Henry Blackstone.
Hob.,	Hobarts' Reports.
Jur.,	Jurist.
L. J. C. C. or L. J. L. C.	Law Journal, Lord Chancellor's Court.
L. J. C. P.,	Law Journal, Common Pleas.
L. J. Exc.,	Law Journal, Exchequer.
L. J. M. C.,	Law Journal, Magistrates' Cases.
L. J. Q. B.,	Law Journal, Queen's Bench.
L. T. or Law T.,	Law Times.
Lev.,	Levinz.
Lord Raym.,	Lord Raymond's Reports.
M. & C. or M. & Cr.,	Mylne & Craig.
M. & G. or M. & Gr.,	Manning & Granger.
M. & M. or Moo. & Mal.,	Moody & Malkin.
M. & R. or Moo. & Rob.,	Moody & Robinson.
M. & S.,	Maule & Selwyn.
M. & W. or M. & Wels.,	Meeson & Welsby.
Mod.,	Modern Reports.
N. & M. or Nev. & Man.,	Neville & Manning.
N. & P. or Nev. & Per.,	Neville & Perry.
N. R. or N. C.,	Bingham's New Reports.[1]
Noy.,	Noy's Reports.
Pea.,	Peake.
Plowd.,	Plowden.
Pr.,	Price.
P. Wm.,	Peere Williams.
Q. B.,	Queen's Bench Reports (Ad. & Ell. N. S.)[2]
Rob. Adm. Rep.,	Robinson's Admiralty Reports.
Rol.,	Rolle.
R. & M. or Ry. & M.,	Ryland & Manning.
Salk.,	Salkeld.
Saund. or Wms. Saund.,	Williams's Saunders.
Scott, N. R.,	Scott's New Reports.
Sid.,	Siderfin.
Sim,	Simons.
Skin.,	Skinner.
Stark.,	Starkie's Reports.
Stark. N. P. C.,	Starkie's Nisi Prius Cases.
Str.,	Strange.
Taunt.,	Taunton.
T. R.,	Term Reports (Durnford & East).
Tyrw.,	Tyrwhitt.
Vern.,	Vernon.
Ves., sen.,	Vesey, senior.
Ves., jun.,	Vesey, junior.
W. Bl.,	William Blackstone.
Wils.,	Wilson.
Y. & C. or Y. & Col.,	Younge & Collyer.
Y. & J.,	Younge & Jervis.

[1] It is believed that the citation of "New Reports" generally refers to the fourth and fifth volumes of the reports of Bosanquet and Puller; those of Bingham being always cited as "Bingham's New Cases." See the preface to 1 Bing. New Cas.

[2] See note to preceding page.

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THE LAW OF CONTRACTS.

LECTURE I.

ON THE NATURE AND CLASSIFICATION OF CONTRACTS, AND ON CONTRACTS BY DEED.

THE whole practice of our English Courts of Common Law, if we except their criminal jurisdiction, with which we have at present no concern, and their administration of the law of real property, of which, as Real Property Law forms the subject-matter of another distinct class of Lectures, it is not my intention to speak, —if, I say, we except these two heads, to which may possibly be added those cases which fall within the fiscal jurisdiction peculiar to the Court of Exchequer, the whole of the remaining subjects with which the jurisdiction of a Court of Common Law is conversant may be distributed into two classes, *Contracts* and *Torts*. Of this you can easily satisfy yourselves by putting to your own minds any conceivable case of legal inquiry. If it do not involve a question of criminal law, or of the title to land, or of Exchequer jurisdiction, [*2] you *will find that it resolves itself into a *contract* or a *tort*. Thus, suppose it to be the non-performance of a covenant, the non-payment of a bond, the dishonour of a bill of exchange, the non-payment of rent, the default of a surety,—these are all subjects of inquiry arising from contracts. So, again, if it involve an

assault on the person, an injury to the reputation by libel or slander, a nuisance to the dwelling or the premises, a conversion of property,—these are only so many descriptions of torts. And as the subjects of legal inquiry divide themselves, so do the forms in which the inquiry is carried on; for all actions, as you are aware, are of TORT or of CONTRACT, a division which, as you see, is rendered necessary by the very nature of things, and does not result from any arbitrary principle of arrangement.

Now, therefore, the whole subject-matter of the inquiries about which our Courts of Law are conversant (excepting the cases I have excepted) being distributable into these two heads, *Contract* and *Tort*, I am about to take the former of them, that of *contract*, and state to you those principles of every-day recurrence which govern the law of England relative to contracts, and which it is absolutely necessary that every lawyer must bear constantly in mind, and have (to use the ordinary expression) at his fingers' ends, if he will avoid falling into egregious mistakes in the course of [*3] his daily practice. This is all that can be done in an elementary lecture *like the present. Nice distinctions and subtile disquisitions are neither very intelligible when delivered *vivâ voce*, nor very easily carried away by the recollection.

All Contracts are divided by the Common Law of England into three classes:—

1. Contracts by Matter of Record.
2. Contracts under Seal.
3. Contracts not under Seal, or Simple Contracts.

With regard to contracts by matter of record, they are so little used in the ordinary affairs of private individuals, that I may dismiss them in a very few

words. At an early period of our law, statutes merchant and statutes staple, which are both contracts of record for the payment of debts, were ordinarily in use. They are, however, now almost unheard of. The only contract of record with which we now occasionally meet is a recognizance, and that oftener in matters in which the Crown is concerned than between subject and subject. Thus the ordinary mode of compelling a witness to attend and prosecute or give evidence in a criminal case is by *recognizance*, in which he binds himself to the Queen in a certain sum conditioned for the performance of a duty imposed on him; and in case of his making default, that sum accordingly becomes forfeited, and payable to Her Majesty. The commonest case of a recognizance between *subject and subject was that of bail, which has, however, become much less frequent since the Act restraining the right to arrest on mesne process. [*4]

The peculiar incidents of a contract of record are, first, that, like all records, they prove themselves, their bare production without any further proof being sufficient evidence of their existence, should it be controverted.

Secondly, That if it become necessary to enforce them, that may be done, if it be thought proper, by writ of scire facias,—a writ which lies on a record only, and consequently cannot be made use of for the purpose of enforcing any other description of contract.

However, as I said, the other two classes of contract are those which are of most practical importance, and to which, therefore, my observations will be addressed. These, as I have said, are—

1. Contracts by Deed.
2. Contracts without Deed, or Simple Contracts.

1. With regard to contracts by deed:

A deed is a written instrument, sealed and delivered.

Let us pause for a few moments to consider the parts of this definition.

In the first place, it is a written instrument, and this writing, the old books say, must be on paper or parchment, for if it were written on linen, woods, or [*5] other substance, it would not be *a deed. But, though every deed must be written, it is not necessary that every such instrument should be *signed*, for at Common Law signature was not an essential ceremony; and, although now by several statutes, particularly the Statute of Frauds, of which I shall have presently a good deal more to say, *signature* has been rendered essential to the validity of certain specified contracts, yet there are still many which are not affected by any statute, and to such contracts, even if entered into by deed, signature is not an essential. (See Bacon's Abr. Obligation C.) (*a*)

(*a*) The question whether it is essential that deeds be signed as well as sealed, has been recently argued in the Court of Queen's Bench, in the case of Cooch v. Goodman, 2 Q. B. 580, 42 E. C. L. R., where Lord Denman, C. J. says, "Mr. Justice Blackstone, in his Commentaries, vol. ii. p. 306, lays it down that the Statute of Frauds has restored the old Saxon form of signing, and superadded it to sealing and delivery in case of a deed. Mr. Preston, on the other hand, in his edition of Sheppard's Touchstone, p. 56, b, treats this passage in Blackstone as a mistake, from not attending to the words of the statute, and holds it clear that no signature is necessary in the case of a deed. It is curious that the question should now for the first time have arisen in a court of law, and perhaps as curious that it is not necessary now to determine it." It thus appears to be still an open question. Seals in England date with the Conquest. The Normans first introduced them, and caused the Saxon writings to be sealed with them. The inability of many of the Norman settlers to write, not improbably led to the disuse of signatures and the general substitution of seals. We learn from Dufresne and Selden that seals were granted to the heirs of feudal estates on their majority; and Glanville says, that "If a man acknowledges the seal

*Secondly, it must be *sealed and delivered.* This is the main distinction between a *deed* [*6–*7] and *any other contract. The seal is an in-

attached to a deed to be his own seal, he is bound to warrant the terms of the deed, and in all respects to observe the compact expressed in the deed, as contained in it, without question; and it is to impute it to his own indiscretion if he incur loss by negligently preserving his own seal;" and down to the 29 Chas. II. no doubt was entertained of the sufficiency of sealing and delivery without signing; 3 Preston, Abs. 61. The Statute of Frauds, as Blackstone observes, "expressly directs the signing, in all grants of lands, and many other species of deeds, *in which* (he adds), therefore, signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other."

The question arose whether sealing was signing within the statute as early as 33 Chas. II., when the Common Bench incidentally decided that it was (see Lemayne v. Stanley, 3 Lev. 1); but the decision was there based on the fact, that the testator Stanley had written the instrument with his own hands, and that the words, "I, John Stanley, make this my last will and testament," was a sufficient signing within the statute, which does not direct whether it shall be signed at the top or the bottom, or the margin, but that signing in any part shall be sufficient. The case is cited in that of Warneford v. Warneford, Strange, 764, and appears to have been the authority for the judgment given by Raymond, C. J., who ruled that "sealing a will is a signing within the Statute of Frauds and Perjuries." This decision, though cited and overruled by Blackstone, seems to have given rise to the broad doctrine laid down in subsequent text-books, that "the Statute of Frauds is applicable only to mere agreements not attended with the solemnities of a deed;" although that statute in express terms requires that all devises, &c., "shall be in writing, and *signed* by the party so devising the same;" and the 3d section, relating to leases, expressly names deeds—"unless it be by deed or note in writing." Such deeds, therefore, clearly require signature, as stated in the text.[1]

Sir Edward Sugden says of Powers, "If the instrument be a will,

[1] A case came before Lord Eldon (Wright v. Wakeford, 17 Ves. 434), upon a bill for specific performance in which the point was whether a power of sale to be testified "by writing under the hands

dispensable part of every deed,[1] and so is the *delivery;* with regard to which you must, however, observe, that

and the subject of the power be *personal* estate, it may be executed by a mere paper writing, without signature or attestation, in like manner as a will of personalty. So, if the property be *real* estate, the will must be executed *with the solemnities required by the Statute of Frauds*, because it is within all the inconveniences of the statute;" 1 Sug. on Pow. 297. He afterwards says that "Signing is not essential to a deed, though sealing is." (p. 304.)

Mr. Preston, in his note to Sheppard's Touchstone, says, "It is apprehended the statute is applicable to mere agreements, not to deeds: this will appear very clear from the words of the statute." This may be so as regards the 1st section, but nevertheless deeds are expressly named in the 3d section, whilst other sections relate to contracts which are ordinarily by deed. There have been decisions that a mark is a signature (Harrison v. Harrison; Addy v. Grix, 8 Ves. jun. 185), but not that sealing includes signing, or that the signing of deeds may be dispensed with under the Statute of Frauds, except the case in Strange, which, it is submitted, is based entirely on an *obiter dictum* in the case above cited, of Lemayne v. Stanley, and from which Levinz, J. dissented.

It is therefore probable that the signature of deeds will be ultimately held requisite, whenever their subject-matter falls within statutes which expressly require it; but that in other cases sealing and delivery are alone essential.

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and seals" of the parties, and attested by two witnesses, was properly executed by an attestation that the instrument was sealed and delivered. The chancellor thought that in general "a deed if delivered, may be a good deed whether signed or not," but that in the case before him he inclined to the opinion that both signature and sealing were required. He, however, directed a case to the Common Pleas, the majority of the judges of which certified that the power in question had not been well executed; 4 Taunton, 213. This opinion has since been recognised as settled law; Doe v. Peach, 3 Maule and Sel. 581; Wright v. Barlow, 3 Id. 515; and it gave rise to "Mr. Preston's Act," 54 Geo. III., c. 168, making valid deeds *already made* under the above circumstances.

[1] The policy of the common law as to the use and nature of a seal was very fully discussed by Kent, C. J., in Warren v. Lynch, 5 Johns. 244, where the Court refused to recognise a scrawl or scroll made by

it is not absolutely necessary that the party executing should take the instrument into his hand and give it to the person for whose benefit it is intended (see Goodright v. Strahan, Cowp. *204, and Bac. Abr. Obligation D.): thus it is said by Lord Coke, in [*8] the Commentary on Littleton, 36 a, that *a deed may be delivered by words without actual touch, or by touch without words.* "The delivery," his lordship says, "is sufficient without any words, for otherwise a man who is mute could not deliver a deed." . . . . "And, as a deed may be delivered to the party *without words*, so may a deed be delivered by *words without* any act of delivery, as if the writing sealed lieth on the table, and the feoffor or obligor saith to the feoffee or obligee, 'Go, and take up the writing; it is sufficient for you, or it will serve the turn, or take it as my deed,' or the like words, it is a sufficient delivery." (See further Doe d. Lloyd v. Bennett, 8 C. & P. 124, 34 E. C. L. R.) However, in practice, it is always safest and most advisable to follow the ordinary and regular course, which is, to cause the person who is to deliver the deed to place his finger on the seal, and acknowledge

the pen as a seal, and held that a seal must be composed of wax or some tenacious substance. By statute in that State, however (Stat. of 7 April, 1848, c. 197), the impression of the seal upon the paper is sufficient in the case of a corporation, and the statutes of Maine, Vermont, New Hampshire, and Massachusetts, give validity to such impressions in the case of legal processes and official documents. With this exception, all the New England States adhere to the common law requisitions of a seal. In New Jersey, a scroll with the pen is a sufficient seal on any instrument for the payment of money. (Rev. Stat. 1846.) By the common law of Pennsylvania, Delaware, North and South Carolina, and Mississippi, such a scroll has always been recognised as a sufficient seal, and in most if not all the other States, it is believed that the law has been so settled by statute.

the seal to be his seal, and state that he delivers the instrument as his act and deed.(a)

(a) Any print made upon the wax, according to Sheppard's Touchstone, suffices as a seal, and the same piece of wax may serve several parties, so long as each separately impress it for himself, or one for all. (See Cooch v. Goodman, supra.) [Mackay v. Bloodgood, 9 Johnson, 285; Bowman v. Robb, 6 Barr, 202; Tasker v. Bartlet, 5 Cushing, 364.] The 8 & 9 Vict. c. 113, facilitates the admission of certain official documents, and dispenses with proof of the seal.

It is essential that the deed be sealed at the time it is executed. It is laid down in Pigot's case (11 Co. 27), that any material alteration, whether by the party executing, or by a stranger, without the privity of the obligee, will invalidate it. A decision to the contrary, in favour of the validity of a bond in blank afterwards filled up, by Lord Mansfield, in Texira v. Evans, cit. 1 Anst. 228, has been overruled in Hibblewhite v. M'Morine, 6 M. & W. 200; see also Davidson v. Cooper, 11 M. & W. 778, [affirmed "after much doubt" in the Exchequer Chamber, 13 Mees. & Wels. 343], where the placing of seals to a guaranty was held to vitiate it, and the principle laid down in Pigot's case was confirmed.[1]

[1] Pigot's case (also reported in 2 Bulstrode, 246), and Master v. Miller (4 Term, 320, and 2 H. Bl. 140), have always been leading authorities upon the subject of the law of alteration of instruments, the first of them with reference to deeds, and the second to negotiable paper. Pigot's case decided, 1, that where a material alteration was made by any one, without the obligee's consent, the deed was void; but, 2, if altered in an immaterial point, by a stranger, without the obligee's consent, it was not affected thereby; and, 3, that an alteration made by the obligee himself, whether material or not, avoided the instrument. In Master v. Miller the rule in Pigot's case was applied to a bill of exchange, and has since been extended to bought and sold notes, Powell v. Divett, 15 East, 29, and "to all instruments comprehending words of contract;" Mollet v. Wackerbarth, 5 C. B., 181, 57 E. C. L. R. In first considering the extent of the effect of an alteration in the avoidance of an instrument, it is well settled, on both sides of the Atlantic, that while the executory quality of the instrument is destroyed, so that the spoliator can derive no benefit from it, the executed estates and contracts which it has created, or of which it is the evidence, are neither divested nor rescinded; Co. Litt. 225, b, note; Davidson v. Cooper, supra; West v. Steward, 14

*It is not necessary that the delivery should be to the person who is to take the benefit of [*9]

Mees. & Wels. 47; Todd v. Emly, 11 Id. 1; Gould v. Coombes, 1 C. B. 543, 50 E. C. L. R.; Arrison v. Harmstead, 2 Barr, 191; Hatch v. Hatch, 9 Mass. 307; Lewis v. Payn, 8 Cowen, 71; Herrick v. Malin, 22 Wendell, 388; The People v. Muzzy, 1 Denio, 243; Bliss v. M'Intyre, 18 Vermont, 469. And even as to the effect of the alteration upon the instrument itself, it is well settled that it is avoided only as to the party altering; and of this Arrison v. Harmsted, 2 Barr, 191, and Wallace v. Harmsted, 3 Harris, 467, are excellent examples, where a deed conveying a fee simple estate, reserving to the grantor a ground rent, having been altered by the grantor's agent without the knowledge of the grantee, so as to limit the time within which the ground rent could be extinguished, it was held that the grantee took the estate discharged of the covenant to pay the ground rent, and an innocent purchaser of it from the grantor was held not entitled to recover.

The American cases, however, depart from the strictness of Pigot's case as to this, that they generally hold that an alteration, material or not, done by a stranger, and of course without the privity or consent of the obligee, does no harm; Rees v. Overbaugh, 6 Cowen, 750; Cutts v. U. S., 1 Gallison, 69; Nichols v. Johnson, 10 Connect. 193; Rhoads v. Frederick, 8 Watts, 448; U. S. v. Spalding, 2 Mason, 482; U. S. v. Linn, 1 Howard's S. C. R. 104; Lee v. Alexander, 9 B. Monroe, 25 (overruling in that State, Letcher v. Bates, 6 J. J. Marsh, 524); while, on the other hand, in Powell v. Divett and Davidson v. Cooper, supra, it was held, on the authority of Pigot's case, that if the alterations were material, the instrument was avoided, whether the alterations were done by a stranger or a party. An alteration made by the *obligor*, will not, of course, be allowed to defeat the instrument as to him, for he cannot thus be suffered to take advantage of his own wrong; Cutts v. U. S., 1 Gallison, 69; Frost v. Peacock, 4 Edwards' Ch. 678.

Whether the alterations were made before or after execution is a question for the jury. If the instrument has been in the possession of the party claiming upon it, or if, without this being the case, the alteration be beneficial to him, the burden of proof is upon him to explain it; Knight v. Clements, 8 Adol. & Ellis, 215; Chesley v. Frost, 1 New Hamp. 145; Humphreys v. Guillow, 13 Id. 388; Barrington v. The Bank, 14 Serg. & Rawle, 423; Simpson v. Stack-

the deed. (See Doe d. Garnons v. Knight, 5 B. & C. 671, 11 E. C. L. R.) The judgment in that case,

house, 9 Barr, 186; Tillou v. Insurance Co., 7 Barbour's S. C. R. 564. If, however, the alteration be against the interest of the party appearing to have made it, the presumption that it was made after execution may be rebutted; as it may also be by other circumstances, among which is the appearance of the alteration upon the face of the instrument; Bailey v. Taylor, 11 Connect. 531; Truitt v. M'Gowan, 3 Barb. 405; Heffelfinger v. Sheetz, 16 Serg. & Rawle, 44.

In a recent case, the Supreme Court of the United States took a distinction between alterations appearing to be such on the face of the instrument, such as an erasure or interlineation, and those which do not so appear, such as the addition of a seal, and held to be bad, a plea which alleged that the instrument had been, without defendant's knowledge or consent, altered by affixing a seal, on the ground that it should have alleged that the alteration was made by the plaintiff or with his privity, which not being averred, the Court would presume that it was done by a stranger, as pleas were to be taken most strongly against the party pleading them; U. S. v. Linn, 1 Howard 104, S. P. Cotten v. Williams, 1 Florida, 37.

But there is a class of cases which decide that an alteration may be made after as well as before execution by consent of all the parties, and this consent may be express or implied; Wiley v. Moore, 17 Serg. and Rawle, 438; Costen's Appeal, 1 Harris, 296; Speake v. U. S., 9 Cranch, 28; Smith v. Crook, 5 Mass. 538; Willard v. Clark, 7 Metcalf, 437; Tompkin v. Corwin, 9 Cowen, 255; Sans v. The People, 3 Gilman, 336; Richmond Manufacturing Co. v. Davis, 7 Blackford, 412; Hudson v. Revett, 5 Bingham, 372; Watson v. Booth, 5 Maule & Selw., 223, were cases where the direction or consent of the parties was *express*, and they appear to take no distinction under such circumstances between material and immaterial alterations.

Where the consent is, however, to be *implied*, there is more difficulty, and the question of the materiality of the alteration seems to be an important feature. It has repeatedly been held on both sides of the Atlantic, that when an instrument is executed with a blank for the Christian name of a party named therein, it is evidence for the jury that the party executing it intended that blank to be filled up with that name when ascertained, and it is error to reject it on a plea of *non est factum*; Markham v. Gonaston, Moore, 547; Eagleton v. Gutteridge, 11 Mees. & Wels. 465; Stahl v. Berger, 10 Serg. & Rawle, 171; and in Hudson v. Revett, 5 Bingham, 368, the ground

which was delivered by Sir John Bayley, after a *curia advisari vult*, is worthy of a most careful perusal; the

was taken that the delivery of the instrument might, according to the intention of the grantor, be presumed to be suspended till the blank was filled up, when, and not before, the deed was to take effect as a perfect instrument, and this case was so understood in West v. Steward, 14 Mees. & Wels. 48.

But there are cases which go beyond this, and of these, Texira v. Evans, supra, is one, where the defendant, wanting to raise £400, or as much of it as he could, executed a bond in blank and sent it into the market by his servant, who afterwards filled up the blanks. Upon *non est factum* pleaded, Lord Mansfield at Nisi Prius, held the instrument to be a good bond. The decision has been recognised as law in America, in a number of cases, which will be found collected in the note to Hibblewhite v. M'Morine, 6 Mees. and Wels. 215, Am. ed. (to which may be added Richmond Manufacturing Co. v. Davis, 7 Blackford, 412), which case it will be remembered has in England overruled Texira v. Evans, whose authority has also been denied in M'Kee v. Hicks, 2 Devereux (Law), 379; Davenport v. Sleight, 2 Dev. & Battle (Law), 381; Graham v. Holt, 3 Iredell (Law), 300; Cross v. State Bank, 5 Pike, 525; and see U. S. v. Nelson, 2 Brocken. 75; and very recently in Pennsylvania (where Texira v. Evans had been repeatedly approved), Gibson, C. J., quoted with approbation Mr. Preston's well-known objection to its soundness, viz., that it proceeded on an assumption that a man may be bound by a deed executed in his name by an attorney not constituted by deed (of course this objection would not apply in the case of a note), and said that the case could only be sustained, if at all, on the ground that the obligor had estopped himself, by an act in pais; Wallace v. Harmsted, 3 Harris, 462, 468.

In New Hampshire, and perhaps in Massachusetts, it has been held that in order to avoid a deed in any case, the alteration must be fraudulent, whether it be material or not; Chesly v. Frost, 1 New Hamp. 145; Bowers v. Jewell, 2 Id. 543; Adams v. Frye, 3 Metcalf, 109; but in the case of a material alteration, this seems not elsewhere to be recognised; Henning v. Werkheiser, 8 Barr, 519. And the rule has been stated to be that in general "a material alteration by a party of itself avoids the deed as to him, but an immaterial alteration does not, unless it be fraudulent." Note to Master v. Miller, infra.

These are merely the leading principles of law upon the subject of

learning relating to this subject will be found there ably collected and discussed. The inference which the Court, of which his lordship was the organ, there drew from all authorities on the subject was:

1st, "That where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, that is a valid and effectual deed, and that delivery to the party who is to take by it, or any other person for his use, is not essential."

2d, "That delivery to a third person for the use of the party in whose favour a deed is made, where the [*10] grantor parts with all control over *the deed, makes the deed effectual from the instant of such delivery."[1] (See also Doe d. Lloyd v. Bennett, 8 C. & P. 124, 34 E. C. L. R.)(*b*)

(*b*) The doctrine thus stated in Doe d. Garnons v. Knight, had been subsequently more broadly laid down, and without the qualifications by which it was there confined in the judgment of Bayley, J. It has been recently held that where the instrument has been sealed and delivered, its retention by the grantor, though intended by him to render it inoperative, will not affect its validity. See Fletcher v. Fletcher, 4 Hare, 67, where V. C. Wigram says, "No doubt the intention of the parties is often disappointed by holding them to be bound by deeds which they have kept back; but such is unquestionably the law." See also the judgment of Maule, J., in Grugeon v. Gerrard, 4 Y. & Col. 130, and the argument of Mr. Wigram in Dillon v. Coppin, 4 Myl. & Cr. 660, where other cases are collected on this point. See also Hall v. Palmer, 13 Law Jour., V. C. W. 353. [3 Hare, 532.]

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the alteration of instruments, and the student will find most of the above authorities, together with many others, collected and well considered in the note to Master v. Miller, 1 Smith's Leading Cases, 789, 4 Amer. ed.

[1] As early as the year 1809, the case of Belden v. Carter, 4 Day,

Before quitting the subject of delivery, it is right to explain the distinction between a deed ordinarily so

66, was similarly decided in Connecticut upon much the same facts as in Doe v. Knight, and in 1814, twelve years before the decision of that case (which is also reported in 8 Dowl. & Ryl. 348, and see Exton v. Scott, 6 Simons, 21), the same conclusions had been arrived at, upon a review of nearly the same authorities, in the case of Souverbye v. Arden, 1 Johnson's Ch. R. 240, decided by Mr. Chancellor Kent, where the grantor of a voluntary deed having sworn in his answer to a bill filed by the grantees, "that he believed that he and his wife sealed the deed in the presence of two witnesses, and that they may have used the formal words of delivery," it was held that neither the subsequent retention of the possession of the deed by the grantor, nor his subsequent declaration contrary to its tenor, could destroy its efficacy (Young v. Moore, 1 Strobhart, 55); and it is well settled that if the deed *has ever been* once actually delivered, the retention or the parting with its possession is an immaterial fact. Scruggins v. Wood, 15 Wendell, 545; Jackson v. Dunlop, 1 Johns. Cases, 114; Brinkerhoff v. Lawrence, 2 Sandford's Ch. 406; Rosevelt v. Carrow, 6 Barbour's S. C. R. 190; Jones v. Jones, 6 Connect. 111; Den v. Farlee, 1 Zabriskie, 285; Blight v. Schenck, 10 Barr, 285; Farrar v. Bridges, 5 Humphreys, 411.

But upon the question whether there *has* ever been a delivery, the possession of the instrument may have a material bearing. Delivery is, to a certain extent, a question for the jury, but under the direction of the Court; to what extent may be well exemplified by the case of Doe v. Knight, which was an ejectment upon a mortgage. Wynne, an attorney, who had been in his lifetime the owner of the premises in question, had received a large sum for his client Garnons, and sent word to him that he had misapplied £10,000 of it, but that he would make him secure. Some years after Wynne wrote with his own hand a mortgage of all his property to Garnons to secure £10,000, brought it into the presence of his niece, signed and sealed it, said, "I deliver this as my act and deed," and then took it away. In the same month he delivered a parcel to his sister, saying, "Take this, it belongs to Mr. Garnons." Some days after, he asked for and took away the parcel, and in a few days returned it, somewhat reduced in bulk, saying, "Here, put this by." Some months after this, Wynne died, having first executed a second mortgage of all his property to another person. The parcel was found to contain the mortgage which the niece had witnessed, which was to secure

termed, and an *escrow*. An escrow is a deed delivered conditionally to a third person, to be delivered to the

£10,000, together with a statement of the account between Garnons and himself, showing an indebtedness of that amount. The jury were told that if the delivery to the sister was, under the circumstances, a departing with the possession of the deed, and of the power and control over it for the benefit of Garnons, and to be delivered to him either in Wynne's lifetime, or after his death, they should find for the plaintiff, but that if it was merely delivered to her for safe custody as the depositary, and was subject to his future control and disposition, they should find for the defendant. The jury having found for the plaintiff, Sir John Bayley, in delivering the opinion of the Court refusing a new trial, adverting to the objection that the conclusion which the jury drew, viz., that the sister held the mortgage free from the control of her brother, had no premises to support it, answered it by saying that although the sister did return it, yet she would have been justified had she refused. (See to the same effect as to the depositary being a trustee for the grantee, Belden v. Carter, 4 Day, 66.) Two questions, therefore, arose; first, whether when a deed is duly executed and formally delivered with appropriate words, but retained by the party executing it, that retention will obstruct the operation of the deed, which question was answered in the negative; and, secondly, whether if delivery for such party be essential, a delivery to a third person will be sufficient, if such delivery puts the instrument out of the power and control of the party who executed it, though such third person does not pass the deed to the party to be benefitted until after the death of the grantor. This question was answered in the affirmative; and both of these propositions are perfectly settled law on both sides of the Atlantic. Belden v. Carter, 4 Day, 66; Johnson v. Ruggles, 13 Johns. 288; Brown v. Brown, 1 Woodbury & Minot, 325; Bryan v. Wash, 2 Gilman, 557; Merrills v. Swift, 18 Connect. 257; and see many cases collected in the opinion of the Court in Hulick v. Scovil, 4 Gilman, 159.

The grantor's placing the deed upon record—his putting it in the post office directed to the grantee—his bringing an action for the consideration money—the grantee's having possession of the deed—or of the premises consistently with the tenor of the deed—constitute *primâ facie* evidence, upon which the jury may presume that the deed was delivered; Porter v. Cole, 4 Greenleaf, 25; Ward v. Lewis, 4 Pick. 520; Mills v. Gore, 20 Id. 36; Games v. Stiles, 14 Peters,

person for whose benefit it purports to be, on some condition or other. If that condition be performed, it

322; Collins v. Bankhead, 1 Strobhart, 25; Houston v. Staunton, 11 Alabama, 412; M'Kinney v. Rhoads, 5 Watts, 343; Rigler v. Cloud, 2 Harris, 364; Blight v. Schenck, 10 Barr, 285; Gardner v. Collins, 3 Mason, 401. So, where a deed was left in the hands of the magistrate before whom it was acknowledged, and was afterwards taken away by the brother of the grantee for him, this was held sufficient evidence to go to the jury; from which they might presume delivery, Arrison v. Harmsted, 2 Barr, 191; while, on the other hand, if the deed were put into the post office, directed not to the grantee nor his agent, but to an agent of the grantor, it would be error to leave the question of delivery to the jury, as there would be no evidence from which delivery could be presumed; Elsly v. Metcalf, 1 Denio, 324; White v. Baily, 14 Connect. 271. So, where there were neither acts done nor words spoken from which a delivery could be inferred, and the possession of the deed by the party seeking to take advantage of it, was accounted for by his having taken possession of all the papers of the grantor after his death, it was held error to leave the question of delivery to the jury; Clayton v. Liverman, 4 Dev. & Battle, 238.

It is suggested by the English editor (in note b, *suprâ*) that the qualifications adopted in Doe v. Knight had been overlooked by the more recent authorities, and that the doctrine of that case has been of late more broadly laid down. But it is believed that they do not either narrow or enlarge the rules adopted in that case, being (with but one exception, Grudgeon v. Gerrard) cases of voluntary settlements in favour of near relatives, or the like, sought to be enforced in equity, as to which, it has been repeatedly held, that Courts will go farther in the presumption of a delivery than in ordinary cases of conveyance; Bryan v. Wash, 2 Gilman, 557; Brown v. Brown, 1 Wood. & Min., 325; Souverbye v. Arden, &c. In Fletcher v. Fletcher, cited by him, a testator executed a voluntary covenant with trustees, that in case his two natural sons should survive him, his executors should pay to the trustees £60,000 for such of the sons as should be living at the time of his death. This instrument, which purported to be regularly executed, was found among the testator's papers some years after his death, and upon a bill filed by the surviving son to have the covenant enforced, the stress of the argument was laid upon the deed being voluntary, executory, and testamentary, and as such revoked

becomes an absolute deed; till then it continues what is called an escrow, and if the condition never be performed, it never becomes a deed at all.

by the subsequent will, and Vice Chancellor Wigram, after answering these objections, said, "The only other question arises from the circumstance of the instrument having been kept in the possession of the party, does that affect its legal validity? In the case of Dillon v. Coppin, 4 Myl. & Cr. 660, I had occasion to consider that subject, and I took pains to collect the cases upon it. The case of Doe v. Knight shows that if an instrument is sealed and delivered, the retainer of it by the party in his possession, does not prevent it from taking effect. No doubt the intention of the parties is often disappointed by holding them to be bound by deeds which they have kept back, but such unquestionably is the law." The cases thus referred to were Barlow v. Heneage, Pre. Ch. 211; Lady Hudson's case, Id. 235; Clavering v. Clavering, 2 Vernon, 473, Dom. Proc. 1 Bro. P. C. 122; Broughton v. Broughton, 1 Atkins, 625; Doe v. Knight, Sear v. Ashwell, 3 Swans. 411; Worral v. Jacob, 3 Merivale, 256; and Exton v. Scott, 6 Simons, 31; the first four of which were all cited and reviewed in Doe v. Knight, and the language used in that case by Sir John Bayley, and quoted *suprâ*, was cited by Mr. Wigram at length.

In looking at the cases in equity upon this head, much will be found to turn upon the nature of the instrument, and the purpose for which it was intended. (Bryan v. Wash, 2 Gilman, 557; Souverbye v. Arden, &c.) Thus, in Ward v. Lamb, Prec. Ch. 182, the Court refused to decree the giving up of a voluntary bond made to a daughter, to protect the obligor from taxation, and retained by him; and in Cecil v. Butcher, 2 Jacob & Walker, 573, the Court refused to enforce a conveyance made (and retained) by a father in favour of a son in order to give him a qualification to kill game, and the Master of the Rolls, after reviewing the authorities, said, "They have not depended solely upon the question whether the party has made a voluntary deed; not merely upon whether having made it, he keeps it in his own possession; not merely upon whether it is made for a particular purpose; but when all these circumstances are connected together, when it is voluntary, when it is made for a purpose that has never been completed, and when it has never been parted with, then the courts of equity have been in the habit of considering it as an imperfect instrument." Ward v. Ward, 2 Haywood, 226; Jack-

This conditional delivery must be to some third person, for if it were to the party himself who is to be

son v. Inabnit, 2 Hill Ch. 411; Kirk v. Turner et al., 1 Devereux's Ch. 14.

The acceptance by the grantee of a deed is as essential to its validity as its delivery by the grantor. It rests, however, upon much stronger presumptions where the deed purports to confer a benefit, and an actual acceptance need not then be shown in the first instance, either by the grantor himself, or any one beneficially interested under it. Butler & Baker's case, 3 Coke, 26 b; Thompson v. Leach, 2 Ventries, 202; Hatch v. Hatch, 9 Mass. 307; Belden v. Carter, 4 Day, 66; Church v. Gilman, 15 Wendell, 656; Reed v. Marble, 10 Paige, 409; Tate v. Tate, 1 Dev. & Bat. (Ch.), 22; Halsey v. Whitney, 4 Mason, 214. The presumption is of course, however, liable to be rebutted, and it will be nearly, if not quite, overthrown in cases where the acceptance of the deed confers no benefit, or inflicts a positive harm upon the other party. Jackson v. Bodle, 20 Johnson, 184; Camp v. Camp, 5 Connecticut, 300; Renfro v. Harrison, 10 Missouri, 411.

How far the relation back of the subsequent acceptance to the original delivery will affect the attaching of intermediate interests, is a question of some practical importance. In Wilt v. Franklin, 1 Binney, 502, the rights arising under an execution levied between the period of delivery of an assignment for creditors, and assent by the grantee—a space of four days,—were postponed to those arising under the deed. Merrills v. Swift, 18 Connect. 257, was very similar to Doe v. Knight. A debtor being in failing circumstances executed a mortgage, and delivered it to one for the use of the morgagee. The mortgage was immediately recorded, and some time after, was assented to by the mortgagee, and it was held to be entitled to a preference over an intermediate attachment. In Harrison v. The Trustees of Philips' Academy, 12 Massachusetts, 401, where an embarrassed debtor made a conveyance to his sureties by way of precautionary indemnity, of which they were ignorant till a month afterward, when it was assented to by them, it was said by Parker, C. J., that creditors might have arrested the transaction by an execution levied in the intermediate time; but there was a question of fraud in the case, evidence of which would, it is conceived, always invalidate such a transaction, and the remarks on Wilt v. Franklin in M'Kinney v. Rhoads, 5 Watts, 345, were directed to the want of delivery in that case, apart from which, it is said, that the decision is perfectly correct.

benefitted, the deed would become absolute, though the party delivering were to say in express terms that he

Where, moreover, a deed is delivered *as an escrow*, although, as is stated in the text, it relates back to the time of the original delivery (Forster v. Mansfield, 4 Metcalf, 412; Graham v. Hughes, 13 Johns. 235), yet it must be borne in mind that this is for certain purposes only—that this fiction is resorted to in cases of necessity, to prevent injury and uphold the deed; as, for instance, where a feme sole delivers a deed as an escrow, and marries before the condition is performed, it is her deed from the first delivery, as otherwise her marriage would defeat it, Perkins, 139–140; "for in such case from necessity, and *ut res magis valeat quam pereat*, to this intent by fiction of law, it shall be a deed *ab initio*, and yet in truth it was not her deed until the second delivery." Butler & Baker's case, 3 Coke, 36 a. Hence, in accordance with the maxim, *in fictione juris semper equitas existit*, such relation back will not operate to defeat the rights of third persons attaching in the interval; Frost v. Beekman, 1 John. Ch. 296; Green v. Putnam, 1 Barbour, 504; Lewis v. Taylor, Riley's Ch. 179; Carr v. Hoxie, 5 Mason, 60; Merrills v. Swift, supra; and thus in Jackson v. Rowland, 6 Wendell, 666, where a deed was delivered as an escrow, and previously to its subsequent absolute delivery a judgment was obtained against the grantor, under which the land was sold, it was held that the purchaser under this judgment took a good title to the land, and so in Shirley's Lessee v. Ayres, 14 Ohio, 307.

Where a deed is *rejected* by the grantee, the title revests in the grantor, provided the dissent be made by the party really in interest. Thus, where a conveyance was to A. to the use of B., A.'s dissent was not allowed to defeat the use limited to B.; Gorton's case, 2 Roll. Ab. 789, pl. 7. In these cases of rejection the question also arises as to intermediate interests and estates created by the deed. In Thompson v. Leach, 2 Ventries, 201, it was finally held in the House of Lords, reversing the judgments below, that a deed of surrender by tenant for life to a remainder man, barred intermediate contingent remainders, though the grantee rejected the deed when he knew of it; and in Read v. Robinson, 6 Watts & Sergeant, 329, a debtor executed a general assignment for the benefit of his creditors, and delivered it to one of his sons, with instructions to take it to one Ward, who had been making out his father's accounts. Ward took the deed to the assignee, who refused to receive it, and said he would have nothing to do with it. An assignee was then appointed by the Court, who brought trover against the executor of the grantor's will, executed after the assignment. The Court below ordered a nonsuit, on the

intended it to be *conditional only; for it is impossible by words to get rid of the legal operation of the delivery; and therefore in Holford v. Parker, Hob. 246, where the defendant in debt on bond endeavoured to set up a delivery as an escrow to the obligee himself, the Court thought that the plea was so clearly bad, that they would not hear any argument upon the subject. Where, however, the deed is delivered to a third person as an escrow, the delivery is, as I said, conditional, and when the condition has been performed, it becomes absolute and takes effect, not from the date of performing the condition, but from the date of the original delivery; so much so, that it has been held, that where a bond was delivered upon condition, and the obligor and obligee were both dead before the condition was performed, yet on that event happening, it became the deed of [*11]

ground of the refusal of the assignee; but this judgment was reversed by the Supreme Court, which held, that although by the rejection the title might have been remitted to the grantor in case the grantee were the party beneficially interested, yet that the instrument being a trust for creditors, the latter were the parties in interest, and that by the transmission of the deed for acceptance to the assignee, the title instantly passed at law, and it could not be divested by the subsequent disagreement by the assignee; thus showing, as was said by the Chief Justice, in speaking of Thompson v. Leach, "that intermediate interests may fasten on the title, which it is not in the power of the grantee's disagreement to unclasp."

It has been suggested by Professor Greenleaf, in his edition of Cruise on Real Property (Tit. xxxii. ch. 1, § 25, note), that Thompson v. Leach was not the case of the grant of an estate from the absolute owner to a stranger who had no previous interest in it, but it was the annihilation of a particular estate in favour of a person to whom, on the termination of that estate at that time, by what mode soever, the whole property would belong by its original limitation, and that the case of Read v. Robinson was rather decided upon a local statute, authorizing the Court, in case of renunciation or refusal of a trustee, to appoint a new one in his place. The Court did not, however, rest its decision wholly on that ground.

the deceased obligor, so as to create a charge upon his assets as against his representatives. (See Graham v. Graham, 1 Ves. jun. 274; Froset v. Walsh, Bridg. 51.) (*a*)

[*12] *Such, then, being the essentials of a deed, *writing* on paper or parchment, *sealing*, and *delivery*, it is right to add that, for the sake of convenience, deeds are divided into two classes, *Deeds Poll* and *Indentures;* a Deed Poll being (as Littleton informs us,

(*a*) It is no longer necessary to say that a writing is an escrow at its delivery, in order to render it one, though the law is otherwise stated in Sheppard's Touchstone. It is not requisite that this be done by express words, but the facts attending the execution and the result of the transaction may be looked at, and although the delivery were in form absolute, yet if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow; Bowker v. Burdekin, 11 M. & W. 146, per Parke, B.[1]

[1] The point decided in Bowker v. Burdekin was that a deed which was executed as an absolute conveyance, would not the less be an act of bankruptcy, because, on looking at the form of the deed, the conclusion might possibly be come to that the parties did not contemplate that the deed should operate as an act of bankruptcy unless the whole partnership effects were conveyed. The remark cited supra, was said, by Baron Parke, to be the result of the cases of Johnson v. Baker, 4 Barn. & Ald. 440, 6 E. C. L. R.; and Murray v. The Earl of Stair, 2 Barn. & Cress. 82, 9 E. C. L. R., in both of which cases, the instrument was not delivered to the party interested, but left with a stranger; and it must not be inferred from the remark in Bowker v. Burdekin, that a deed purporting to be absolute, and delivered to a party, can by parol evidence, be shown to have been conditional, as the contrary was expressly held in Ward v. Lewis, 4 Pickering, 520, where an insolvent debtor having executed an assignment for the benefit of his creditors, which was found in the hands of the assignee, it was held that the deed could not operate as an escrow, because the prima facie evidence was that it was delivered to the party, and that parol evidence was inadmissible to show that the assignment was meant to take effect only upon the assent of the majority of the creditors.

at sect. 370), "that which is executed by one party only: an indenture, by several contracting parties." The names indeed of Deed Poll and Indenture were, as you probably all know, derived from the circumstance that the former was shaved or *polled*, as the old expression was, smooth at the edges, whereas the latter was cut or indented with teeth like a saw; for, in very old times, when deeds were short, it was the custom to write both deeds on the same skin of parchment, and to write a word in large letters between the parts, and then, this word being cut through, saw-fashion, each party took away half of it; and, if it became necessary to establish the identity of the instrument at a future time, they could do so by fitting them together, whereupon the word became legible. However, this, though the origin of the word *indenture*, has become a mere form; and though, as you are all aware, such instruments are still indented by nicking the edge of the parchment, not teethwise, but in an undulating line, that is a mere form, and might be done in Court during the progress of a trial, if it had been forgotten till then.

There are one or two peculiarities in the *question of a contract made by deed, which as they apply to all contracts by way of deed, this is the proper place to notice. [*13]

In the first place, *a Contract by Deed requires no consideration to support it;* or perhaps it might be more correct to say that the law conclusively presumes that it is made upon a good and sufficient consideration.[1]

[1] The proposition in italics, was properly qualified by the lecturer in the remainder of the sentence. At common law no consideration was requisite to the validity of a deed, but since the introduction of conveyances taking effect by virtue of the statute of uses, courts of equity, and then courts of law, have held a consideration necessary to support such an instrument. It need not be expressed in the deed, but may

The importance of this arises from the strong line of *distinction it creates between Contracts by Deed and Simple Contracts.* For a simple contract, that is, a contract by words or by writing not under seal, requires, as I shall hereafter have occasion to explain more at length, a consideration to support it and give it validity. For instance, suppose a written promise in the words;—"I, A. B. promise C. D. that I will pay the debt he owes to E. F." This promise would be absolutely void, unless it could be shown to have been made in consideration of something given to A. B. for making it; for it would be a promise by him to undertake a liability without any consideration or recompense whatever; and if he neglected to perform it, no action would lie against him, for the maxim *ex nudo pacto non oritur actio* would intervene for his protection. But if to that very instrument, conceived in those very words, the additional solemnity of sealing and delivery were added, so as to make it a deed, it would become a good and [*14] binding covenant on which an action might be *supported (see Fallowes v. Taylor, 7 T. R. 475), and this is on account of the greater formality

be proved. But if expressed, the language of the instrument, so far as the legal effect of the deed is concerned, is conclusive, (Preston on Abstracts, 14), and although in America, there is a numerous class of cases deciding that the consideration may, by parol, be shown to be greater or less, than is expressed (see infra, note 1, to page 17), yet on neither side of the Atlantic is such evidence admitted to defeat the legal effect of the deed as between the parties; Wilt v. Franklin, 1 Binney, 502; Hurn v. Soper, 6 Harris & Johns. 276. Where the rights of *creditors* step in, the rule is different; Preston, supra, 1 Am. Lead. Cases, 1. This is merely mentioned, in order that conclusions might not be drawn from the text which the lecturer did not mean to convey, and on page 81, infra, he refers to the subject again. It may be here observed that there is another class of instruments which prima facie presume a consideration equally with specialties, viz., negotiable instruments. See Mr. Smith's remarks, infra, p. 100.

and solemnity of such an instrument.[1] But, here again, you must observe another well-known and important distinction, namely, that, though it is not necessary to show on what consideration a deed is founded, the party sued upon it is always, on his part, allowed to show that it was founded on an illegal or immoral consideration, or that it was obtained by duress or by fraud; for, were the law otherwise, deeds would, to use the expression of Lord Ellenborough, be made use of as covers for every description of iniquity. It is therefore a well-established proposition that a deed may be invalidated by showing that it is tainted by such circumstances. (See Collins v. Blantern, 2 Wills. 341.)[2] And it signifies not whether the illegality objected to it be a breach of the rules of Common Law, or consist in the contravention of the provisions of some statute. Thus, in Collins v. Blantern, the consideration was the compromise of an indictment for perjury; in Coppock v. Bower, 4 Mee. & Welsb., 361, the compromise of an election petition; in Hindley v. M. of Westmeath, 6 B. & C. 200, 13 E. C. L. R., a future separation between husband and wife; and see Jones v. Waite, 5 Bing. N. C. 341, 15 E. C. L. R.(*a*)

(*a*) Bonds given in consideration of continuing cohabitation are void, but not for past cohabitation, or for the maintenance of the offspring of such intercourse: the rule is, that wherever the nature of the contract gives either party a motive to continue the connexion it is void, because it is *turpis contractus*, but not otherwise; Hall v. Palmer, 3 Hare, 532. [See infra, page 122, and note.]

[1] Thus in Kennedy v. Ware, 1 Barr, 445, the Court refused to give effect to an unsealed assignment of a judgment, intended as an advancement to the assignor's daughter, on the ground that although natural love and affection were sufficient in a sealed instrument to raise a use, yet that they of themselves formed no consideration to support a mere parol gift.

[2] And see the notes to that case in 1 Smith's Lead. Cases, 412, 4th Am. Ed.

[*15] In *these cases the illegality consisted in the infringement of the rule of Common Law, which looks upon such contracts as improper. In other cases, as I said, the contravention of a statute has been held equally fatal; as in Colborne v. Stockdale, Str. 493, and Mazzinghi v. Stephenson, 1 Camp. 291; of the statutes against gaming, in Levy v. Yates, 8 Ad. & El. 129, 35 E. C. L. R.; of the acts for licensing playhouses, and a great variety of examples might be given;[1] but these are sufficient to establish the

[1] "Every contract," said Lord Holt, in Bartlett v. Viner, Carthew, 252, "made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute;" and although attempts have been at times made to consider these words as mere dicta, yet the rule thus stated has been repeatedly enforced; Nerot v. Wallace, 3 Term, 17; Mitchell v. Smith, 1 Binney, 118; Foster v. Taylor, 5 Barn. & Adolp. 887, 27 E. C. L. R.; Cope v. Rowland, 2 Mees. & Welsby, 158; and see infra p. 151 and note, though with respect to cases depending upon the English revenue laws, there appears to be a little discrepancy of decision as to whether those acts intended to vitiate the contract, or to impose a penalty, for the purposes of the revenue, on the party offending; Johnson v. Hudson, 11 East, 180; Brown v. Duncan, 10 Barn.& Cresswell, 93, 21 E. C. L. R.; Wetherill v. Jones, 3 Barn. & Ald. 221, 5 E. C. L. R.; Cope v. Rowland, 2 Mees. & Welsby, 158, Smith v. Mawhood, 14 Id. 461. Some of thesse decisions are referred to in a very recent case in the Supreme Court of the United States (Harris v. Runnels, 12 Howard, 84), where, as a defence to the purchase-money of certain slaves, it was set up that no certificate had been obtained previous to the bringing the slaves into the State of Mississippi, that they had not been guilty of any crime, &c., as was required by a law of that State, which imposed a penalty of $100 for every slave so purchased and brought in; and the Court, in holding the contract itself not vitiated by this statute, said, "We have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids,

principle that, though a man cannot defend himself from liability upon his contract made by deed by saying that there was no consideration for it,[1] he may by saying that there was an illegal one;[2] nay, if there

that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted, without at all lessening its force, though its absolute and unconditional application to every case is denied. It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it; when the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

[1] Nor at common law would fraud be a defence to an action on a specialty, unless, indeed, the fraud related to the execution of the instrument; Vrooman v. Phelps, 2 Johnson, 178; Rogers v. Colt, 1 Zabriskie (N. J.), 704; but in many of our States, the common law rule as to the solemnity of a seal estopping the obligor from any defence except those named, has been relaxed by statutory provisions, so as to entitle the obligor of a bond, under some restrictions, to show by way of defence, its failure, as he formerly could have done its illegality of consideration.

[2] The often quoted remarks of Lord Mansfield upon this rule, may bear repetition here. "The objection," said he, "that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action

were several considerations, and any one of them was illegal, it avoids the whole instrument; for it is impossible to say how much or how little weight the illegal portion may have had in inducing the execution of the entire contract. (See Waite v. Jones. 1 Bing. N. C. 662, 27 E. C. L. R.; Shackell v. Rosier, 2 Bing. N. C. 646, 29 E. C. L. R.) Though it is just the reverse where the consideration is good, and there are several covenants, some legal, some illegal; for then the illegal promises alone will be void, and the legal ones valid. (See Gaskill v. King, 11 E. 165; How v. Synge, 15 E. 440.)(*a*)

[*16] *The next peculiarity of a contract by deed is its operation by way of *estoppel;* the meaning of which is, that the person executing it is not permit-

(*a*) "Where the condition of a bond is entire, and the whole be against law, it is void; but where the condition consists of several parts, and some of them are lawful, and the others not, it is good for so much as is lawful, and void for the rest;" 1 Saund. 66, N. 4. Some contracts, bad in part, are rendered wholly void by statute; in all other cases the practical distinction seems to be whether the good covenants or conditions are severable from the bad ones, and whether the illegality of the one affects the other. See Chesman v. Nainby, 2 Lord Raym. 1456; Mallam v. May, 11 M. & W. 653. A covenant, for instance, not to carry on business as a perfumer "within the cities of London and Westminster, *or* within the distance of six hundred miles from the same respectively," was held divisible, and that the plaintiff could recover on that part of the covenant which related to London and Westminster, though the latter was void as an illegal restraint of trade; Green v. Price, 13 M. & W. 695. [As to which, see infra, p. 126, &c.]

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appears to arise, *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, '*potior est conditio defendentis.*'" Holman v. Johnson, Cowper, 343.

ted to contravene or disprove what he has there asserted, though he may where the assertion is in a contract not under seal. A good example of this is the case of a receipt. A *creditor* who has given a receipt not under seal is nevertheless permitted to prove that he has not received the money; Graves v. Key, 3 B. & Ad. 313, 23 E. C. L. R.; Farrar v. Hutchinson, 9 Adolp. & Ellis, 641; Stratton v. Rastall, 2 T. R. 366;(*a*) but *it is otherwise if the receipt be by deed, [*17] for then the law admits no evidence to the contrary (see the judgment of the Court in Fetch v. Sut-

(*a*) Partners also are not concluded by the receipts of a co-partner if fraudulently given. (See Farrar v. Hutchinson, 9 Ad. & Ell. 641;[1] 36 E. C. L. R.) And where a release is valid in law and invalid in equity, and is a fraud on third persons, the courts of law will set it aside; but in order to call upon the Court to exercise this equitable jurisdiction, it must be made out manifestly and clearly that there has been a fraud by some person upon the plaintiff seeking to enforce the demand, and that the defendant was a party to the fraud; unless that be clearly made out the Courts will not interfere, and the release is conclusive. Phillips v. Claggett, 11 M. & W. 84.

[1] A receipt given by a member of a firm to one of its debtors will of course only bind the partnership so far as it is evidence of an actual transaction, and like any other receipt, is open to explanation. In Farrar v. Hutchinson, the suit was brought by a firm for the price of goods, and a memorandum to the same effect as a receipt in full was set up by the defendants, which the plaintiffs contended was in fraud of the partnership and procured for the purposes of the cause, and Lord Denman left it to the jury to say whether the receipt were bona fide or for the purpose suggested. And as nothing is better settled than that a partner cannot apply partnership funds to the payment of his individual debt, unless with the assent of the firm, a receipt given by one partner to a debtor of the firm will not protect the latter if the firm can show that the payment of the individual debt was the foundation of the receipt. Gram v. Cadwell, 5 Cowen, 489; Everingham v. Ensworth, 7 Wendell, 328.

ton, 5 East, 230).[1] Such is the nature of what we call an *estoppel* created by deed, the principle of which is explained by Mr. J. Taunton in Bowman v. Taylor, 2 Ad. & Ell. 278, 29 E. C. L. R. "The principle," said his lordship, "is not so unjust or absurd as it has been too much the custom to represent. The principle is that, where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted."(*a*)

(*a*) Recent examples of estoppel by deed and record occur in Doe dem. Levy v. Horne, 3 Q. B. 760, 43 E. C. L. R.; Darlington v. Pritchard, 4 M. & Gr. 783, 42 E. C. L. R.; Carter v. James, 13 M. & W. 137; Beckett v. Bradley, 8 Scott, N. R. 843. It may also

[1] The current of authority, however, on this side of the Atlantic has much relaxed the strictness of the English cases on this subject. Thus it may be considered as settled, notwithstanding some early cases to the contrary, that evidence is admissible, either on the part of the grantor or the grantee, to show that the consideration named in a deed was really greater or less than is there expressed. Bullard v. Briggs, 7 Pickering, 533; Wade v. Mervin, 11 Id. 288; Clapp v. Tirrell, 20 Id. 247; M'Crea v. Purmort, 16 Wendell, 460 (where many authorities are cited and commented on); Burbank v. Gould, 15 Maine, 118; Belden v. Seymour, 8 Connecticut, 310; Meeker v. Meeker, 16 Connecticut, 383; Beach v. Packard, 10 Vermont, 96; Bingham v. Weiderwax, 1 Comstock, 509; Watson v. Blain, 12 Serg. & Rawle, 131; Jack v. Dougherty, 3 Watts, 158; Bolton v. Johns, 5 Barr, 145; Harvey v. Alexander, 1 Randolph, 219; Wilson v. Shelton, 9 Leigh, 342; Curry v. Lyles, 2 Hill (S. C.), 404; Moore v. M'Kee, 5 Smedes & Marshall, 438; unless such evidence is introduced, either directly or indirectly, for the purpose of defeating the operation of the instrument as a conveyance, as by showing it void for want of a sufficient consideration; Wilt v. Franklin, 1 Binney, 502; Hurn v. Soper, 6 Harris & Johnson, 276. Thus a grantee may prove the expressed consideration to be greater, for the purpose of increasing his damages on the covenants in the deed; Belden v. Seymour, 8 Connecticut, 310; while on the other hand, the grantor may prove it less for the purpose of diminishing them; Morse v. Shattuck, 14 New Hampshire, 229; Harlow v. Thomas, 15 Pick. 70.

*The next peculiarity in a contract by deed is its effect in creating a *merger*. This [*18–*19]

arise on Bills of Exchange. Sanderson v. Colman, 4 M. & Gr. 209, 43 E. C. L. R.; Armani v. Castrique, 13 M. & W. 443. An estoppel may arise in matter of recital [of which instances may be found in Denham v. Alden, 20 Maine, 228; Green v. Clark, 13 Vermont, 158; Inskeep v. Shields, 4 Harrington, 345], but not in a collateral action between other parties than those to the instrument which contains the admission. In the case of Carpenter v. Buller, 8 M. & W. 200, it was held that, "If a distinct statement of a peculiar fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord Coke says on the matter of recital in Coke Littleton, 352 b; and a recital in instruments not under seal may be such as to be conclusive to the same extent. A strong instance as to a recital in a deed is found in the case of Lainson v. Tremere, 1 A. & Ell. 792, 28 E. C. L. R. * * * *. By his contract in the instrument itself, a party is assuredly bound, and must fulfil it. But there is no authority to show that a party to the instrument would be estopped in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence; for instance, in another suit, though between the same parties, where a question should arise whether the plaintiff held at a rent of 170*l.* in the one case, or was married in the other case, it could not be held that the recitals in the bond were conclusive evidence of these facts. *Still less would matter alleged in the instrument wholly immaterial to the contract therein contained;* as, for instance, suppose an indenture or bond to contain an unnecessary description of one of the parties as assignees of a bankrupt, overseer of the poor, or as filling any other character, it could not be contended that such statement would be conclusive on the other party, in any other proceeding between them."

In order to take advantage of an estoppel by deed or record, it must be pleaded, where there is an opportunity of doing so, otherwise the estoppel is waived. 2 Smith's L. C. 444, 457; Doe v. Huddart, 2 Cr. M. & R. 316. But an estoppel may arise from some act of the party estopped, as well as from matter of record; this is called an estoppel in pais, as where one man has accepted rent from another,

happens *when an engagement has been made by way of simple contract, that is, by words in writing not

in which case he is estopped from afterwards denying that such person was then his tenant. Stephen on Pl. 222. And a landlord is similarly estopped from treating as a tenant him whom he has required to enter into that relation with another instead of himself. Downs v. Cooper, 2 Q. B. 256, 42 E. C. L. R., per Lord Denman, C. J.[1] It appears by a subsequent decision that the acts in pais relating to demises must be some "acts of notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate and the like." Lyon v. Read, 13 M. & W. 285, in which case the doctrine held by Bayley, J., in Thomas v. Cooke, 2 B. & Ald. 119, is questioned by the Court of Exchequer, and elaborately reviewed. See also Doe d. Levy, supra, as to the knowledge of the parties. See also 3 Sug. Vend. & Purch. 428, 10th edit. Estoppels in pais may, but need not be pleaded. See Pickard v. Sears, 6 Ad. & Ell. 474, 33 E. C. L. R., where the Court laid down this rule:—"Where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." [So it was said in Welland Canal Co. v. Hathaway, 8 Wendell, 483: "As a general rule, a party will be concluded from denying his own acts or omissions, which were expressly designed to influence the conduct of another, and did so influence it; and where such denial will operate to the injury of the latter; and where, in good conscience and honest dealing, he ought not to be permitted to gainsay them."] See also Sanderson v. Colman, 4 M. & Gr. 220, 43 E. C. L. R, per Tindal, C. J.; Sheffield and Manchester Railway Company v. Woodcock, 7 M. & W. 574, 583; Gregg v. Wells, 10 Ad. & Ell. 90, 37 E. C. L. R.; Sandys v. Hodgson, 10 Ad. & Ell. 472. Examples of estoppels in pais also occur in Reg. v. Leominster, 5 Q. B. 640, 48 E. C. L. R.; Reg. v. Westmoreland, 12 Law Journ. M. C. 113; [and see Brewer v. Boston and Worcester R. R. Corporation, 5 Metcalf, 479, and cases cited.]

[1] One of the most frequently occurring instances of estoppel in pais, or, as it should be in this case more correctly termed, equitable estoppel, is the rule which, in its general application, prohibits the tenant from denying his landlord's title, and which, although it has

under seal, and afterwards the very same engagement is entered into between the same parties by a deed.

been supposed to have been feudal in its origin, seems to have arisen in later times. (See Mr. Hare's note to Duchess of Kingston's case, 2 Smith's Leading Cases, 569, 4th ed.; Morris v. Replevin, 121.) "The principle was of necessity called into being by that feature of the action of ejectment which requires an absolute possessory title in the plaintiff, and makes, in its absence, the mere fact of possession, decisive in favour of the defendant. The result of allowing the tenant to deny the right of the landlord, in an ejectment for the land, would therefore be to take the estate from the latter, and confer it on the former, whenever there was a defect, either in the title itself, or the proof brought forward to sustain it. This would obviously be equally inconsistent with public policy and private faith, and would prevent men from letting their property, even when they are unable to use it themselves. When, therefore, possession is obtained under a lease, the lessee is estopped from keeping the land in violation of the agreement under which it was acquired." Note to Duchess of Kingston's case.

The rule therefore is a very general one with respect to an ejectment brought by the landlord against the tenant (unless, indeed, in the case where the assent of the latter is produced by the fraud or misrepresentation of the former, Miller v. M'Brien, 14 Serg. & Rawle, 382; Hockenburg v. Snider, 6 Watts, 44,) and also with respect to actions brought by the landlord to recover the rent, for "the mischief to which the absence of such a rule as between landlord and tenant must lead, would evidently be that a tenant, having obtained the possession from his landlord, could betray it to another, and thus drive the former to an ejectment to regain the possession. The result would be that no landlord would ever be safe from the prospect of litigation. Hence the tenant's obligation to restore to him the possession." Rawle on Covenants for Title, 235. It may also be observed that where the lease is by indenture, the law of "estoppel by deed" applies; Jordan v. Twells, Rep. temp. Hardwicke, 161; Palmer v. Ekins, 2 Raymond, 1351. And where the action is assumpsit for use and occupation, the issue sought to be raised by the question of title is an immaterial one; Lewis v. Willis, 1 Wilson, 314; Doe v. Smythe, 4 Maule & Selw. 347; Cobb v. Arnold, 7 Metcalf, 398.

The rule only operates, however, to debar the tenant from denying the title at the time of possession given, and he is at liberty to show

When this happens, the simple contract is merged, lost, sunk, as it were, and swallowed up in that under seal, and becomes totally extinguished. Suppose, for instance, I give my creditor a promissory note for 50*l.*, and then a bond for the same demand, the note is lost, swallowed up in the bond, and becomes totally extinct and useless.[1] (See Bayley on Bills, 5th *edition, 334, 335.) Another peculiar incident to

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that it has since expired or been defeated; Walton v. Waterhouse, 1 Wms. Saunders, 418, note; Hollicraft v. Keep, 2 Moore & Scott, 767; Jackson v. Rowland, 6 Wend. 666; Devatch v. Newson, 3 Hammond, 57; Randolph v. Carlton, 8 Alabama, 606; or such circumstances as amount to a constructive eviction, as by being compelled to make payments to a mortgagee, ground landlord, &c.; Doe v. Barton, 11 Ad. & Ell. 314; 39 E. C. L. R.; Mayor of Poole v. White, 15 Mees. & Welsby, 577; Waddilove v. Barnett, 2 Bing. N. C. 538; 29 E. C. L. R.; Franklin v. Carter, 1 C. B. 760; 50 E. C. L. R; Jones v. Clark, 20 Johnson, 51; Magill v. Hinsdale, 6 Connecticut, 469; Smith v. Sheppard, 15 Pick. 147; Weld v. Adams, 1 Metcalf, 494: George v. Putnay, 4 Cushing, 355; Greno v. Munson, 9 Vermont, 37; Chambers v. Pleak, 6 Dana, 428.

[1] Curson v. Monteiro, 2 Johnson, 308; Bray v. Bates, 9 Metcalf, 250; and see *passim* the notes to Cumber v. Wane, in 1 Smith's Lead. Cases. The operation of this principle of law, and the distinction between a merger and a satisfaction of a debt, have been thus ably pointed out by Gibson, C. J., in Jones v. Johnson, 3 Watts & Serg. 277: "There is a substantial distinction, which I have not seen particularly noticed, between cases of extinguishment by merger of the security, and cases of extinguishment by satisfaction of the debt. These classes, though depending on different principles, have usually been confounded, and hence a perceptible want of precision in the language of those who have written or spoken of them. In the first of them the original security is extinguished, but the debt remains; in the second, the debt as well as the security is extinguished by the acceptance of another debt in payment of it. Extinguishment by merger takes place between debts of different degrees, the lower being lost in the higher, and, being by act of law, it is dependent on no particular intention; extinguishment by satisfaction takes place indifferently between securities of the same degree or of different degrees, and, being by act of the parties, it is the creature

a contract by deed is that its obligation cannot be got rid of by any matter of inferior degree: thus a verbal

of their will. No expression of intention would control the law which prohibits distinct securities of different degrees for the same debt; for no agreement would prevent an obligation from merging in a judgment on it, or passing in *rem judicatam*. Neither would an agreement, however explicit, prevent a promissory note from merging in a bond given for the same debt by the same debtor; for, to allow a debt to be, at the same time, of different degrees, and recoverable by a multiplicity of inconsistent remedies, would increase litigation, unsettle distinctions, and lead to embarrassment in the limitation of actions, and the distribution of assets. But as the existence of a promissory note as a concurrent security for a book debt produces no such consequences, it operates no extinguishment by act of the law; and it depends on the assent of the parties, tacit or explicit, whether the new evidence of the debt is accepted in discharging the old one. It is true there are presumptions which operate even in cases of intention, as *primâ facie* evidence on the one side or the other; for instance, that a bond given by a stranger after the debt incurred was accepted as collateral security. These, however, are legal presumptions of mere facts to be drawn by the jury under the direction of the Court, and not, as in merger, *presumptiones juris et de jure*, which are so absolute that they cannot be rebutted.

"But, merger takes place only where the debt is one, and the parties to the securities are identical. Hence, there is no extinguishment where a stranger gives bond for a simple contract debt, or confesses a judgment for a debt by specialty. In either case the original debt may be extinguished by the subsequent one, but not by merger, which works a dissolution not of the debt, but of the original security, whose existence sinks into that of the succeeding one, and for that purpose the union must be so intimate that the one cannot be separated from the other. In a case of merger, therefore, the debt is the same, though the old evidence of it melts into the new one, and the creditor merely gains a higher security without having an indivisible debt of different degrees, but such a result is not obtained where the debt is compounded of new responsibilities, as it must be where all the parties were not originally bound. When the debtor is bound with a stranger, or for a different sum, his responsibility is changed in more respects than the quality of the security. The difference, on the whole, consists in this, that in a case of merger

license will not exempt a man from liability for breach of his covenant. The last case on this subject is West v. Blakeway, 2 M. & Gr. 729, 40 E. C. L. R.: there a tenant had covenanted not to remove a greenhouse, and it was held no defence for him against an action for so doing, that he had his landlord's subsequent per-

there is a change only of the security; but, in a case of satisfaction by substitution, there is a change of the debt."

But although the intention of the parties cannot prevent the operation of a merger when a higher security is taken for a lower one, on the ground that there cannot be two distinct liabilities for *the same debt*, yet it is also undoubtedly settled that it may be shown that the higher security is taken as collateral for the payment of the lower, that is to say, that it is a new security for a new debt, intended to protect the first; Yates v. Aston, 4 Queen's Bench, 196; Ansel v. Baker, 15 Id. 20; Railway Co. v. M'Namara, 3 Excheq. 627; U. S. v. Lyman, 1 Mason, 505; Averill v. Loucks, 6 Barbour, 470; Butler v. Miller, 5 Denio, 159; although the presumption where the bond is between the same parties, and for the same sum is that the new security was taken as a satisfaction; Frisbie v. Larned, 21 Wendell, 450; Stewart's Appeal, 3 Watts & Serg. 476; Bond v. Aitken, 6 Id. 165; Butler v. Miller, supra; Price v. Moulton, 2 Eng. Law & Eq. R. 307.

A very common instance of the operation of merger occurs in the sale of real estate, when by the acceptance of the deed which consummates the transaction the articles of agreement are annulled; Howes v. Barker, 3 Johns. 506; Houghtaling v. Lewis, 10 Johnson, 299; Wilson v. M'Neal, 10 Watts, 427; Creigh v. Beelin, 1 Watts & Sergeant, 83; Williams v. Morgan, 15 Queen's Bench, 789, 69 E. C. L. R., unless in case of fraud or mistake; Lee v. Dean, 3 Whart. 316; Jenks v. Fritz, 7 Watts & Sergeant, 201; or unless part of the consideration should be the future performance of certain stipulations in the articles, in which case, the deed may be considered not so much a merger of the original contract as a part performance of it; Selden v. Williams, 9 Watts, 12; Brown v. Moorhead, 8 Serg. & Rawle, 569. In the latter case, however, it is said that to rebut the presumption that the law would otherwise make (viz., that of the merger), the intention to the contrary must be clear and manifest; Seitzinger v. Weaver, 1 Rawle, 385.

mission so to do; that permission not being shown to have been under seal. "It is a well-known rule of law," said the Lord Chief Justice, "that *unumquodque ligamen dissolvitur, eodem ligamine quo et ligatur.* This is so well established," continued his lordship, "that it appears to me unnecessary to refer to cases. I will mention only Rogers v. Payne, 2 Wils. 376, which was an action of covenant for the non-payment of money; the defendant pleaded a parol discharge in satisfaction of all demands. It was held upon demurrer that the covenant could not be discharged without deed, and Blake's case, 6 Coke, 43 b, was cited." See also Harris v. Goodwyn, 2 M. & Gr. 459, 40 E. C. L. R.[1]

[1] West v. Blakeway must be considered as laying down a more rigid rule than has been observed on this side of the Atlantic, where there have been many decisions to the effect that a parol dispensation with the performance of a sealed contract is valid (and similar in its effect to a license to exercise dominion over land, which, while unrevoked, is a justification for any acts done under its authority), upon the ground, that although the contract itself cannot be dissolved unless by an instrument of equal solemnity as that creating it, yet that the rights proceeding from it may be varied or released by parol; United States v. Howell, 3 Wash. C. C. R. 620; Fleming v. Gilbert, 3 Johns. 528; Langworth v. Smith, 2 Wendell, 587; Dearborn v. Cross, 7 Cowen, 48; Leavitt v. Savage, 16 Maine, 72; Marshall v. Craig, 1 Bibb, 379; and such was the view taken in the earlier English cases; 1 Roll. Abr. 453, pl. 5; Id. 455, pl. 1; Year Book, 2 Hen. 6, 37; Ratcliffe v. Pemberton, 1 Espinasse, 35; Blackwell v. Nash, 1 Strange, 535; Jones v. Barkley, Douglass, 684; in which case it was held that a tender of performance and waiver of it (the evidence of which must always rest in parol), were equivalent to actual performance. In Cordwent v. Hunt, 8 Taunton, 596, it was, however, held that in an action of covenant for not erecting a threshing mill, it was no defence that the omission to do so was at the special request of the plaintiff. This case was followed by West v. Blakeway, supra, where the defendant had, in a lease executed to him by the plaintiff's testator, covenanted not to remove any buildings erected on the premises during the term, and the breach alleged was that he had permitted the removal of a greenhouse, to which the defendant pleaded that after the execution of the lease, the term had been

Again, a deed has this further advantage of a simple contract, that in case of the death of the party bound by it, it charges his heirs (if the deceased bound his heirs by using words for that purpose in the deed) to the extent of any assets that may have descended to him.

[*21] You will find the nature of the heir's liability *fully explained in the notes to Jefferson v. Morton, 2 Wms. Saund. 6, n. 4.(*a*) If, indeed, the debtor had devised the land away, instead of allowing it to descend to his heir, the creditor could, at common law, have sued the devisee. However, by stat. 3 W. 3, c. 14, usually called the Statute of Fraudulent Devises, the devisee was made liable as well as the heir, and the enactments of this statute have been repeated, with several improvements, in stat. 1 W. 4, c. 47, usually called Sir Edward Sugden's Act: and on the construction of which you may see Farley v. Briant, 3 Ad. & Ell. 839; 30 E. C. L. R.[1]

(*a*) 2 Wm. Saund. p. 8 a, et seq., 6th edit.

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assigned to a third person, to whom the plaintiff's testator promised that if he would erect the greenhouse, he should have liberty to remove it at the expiration of the lease. Under these circumstances, as has been well observed of this case, there can be no question that upon familiar principles, a parol license to remove the greenhouse would have protected a party in so doing, if the greenhouse had at the time of the license been in actual existence and in the possession of the lessor, and the effect of the decision was therefore to deny the operation of such a license, as a protection, while the title to the greenhouse rested on an executory contract, thereby holding that the right of a party can be greater under a contract while yet executory, than after it has passed into execution and conferred an actual title. 2 American Leading Cases, 758, License. Such a course of decision, however, has not, as we have seen, been followed in this country.

[1] This is probably an accidental incorrectness. Farley v. Briant did not depend upon the construction of Sir E. Sugden's act, but upon that of the Statute of Fraudulent Devises, 3 W. 3, c. 14, as the

While on this subject, it may as well be mentioned that, although the right of bringing an action against the heir or devisee is limited to specialty creditors, yet by a statute of 3 & 4 W. 4, c. 104, the simple contract creditors have a remedy against the real estate of the deceased in equity, where, however, their claims are, by the express enactment of the statute, postponed to those of creditors by deeds in which the heirs of the deceased are mentioned.[1]

In the administration of the personal effects also the specialty creditors have, as you are probably aware, a priority over those by simple contract.[2]

Lastly, with regard to the remedy upon a contract by deed; wherever a promise is made by *deed, the performance may be enforced by an action [*22]

testator died before the passage of the former act, and the case was therefore unaffected by it, as was also the case in Hunting v. Sheldrake, 9 Mees. & Welsby, 256; Farley v. Briant decided that the Statute of Fraudulent Devises only applied where *a debt*, in the ordinary sense of the word, existed between the parties, and therefore that an action of debt did not lie against a surety, in respect of breaches of contract which did not occur in the lifetime of the testator, even though the damages might be liquidated, so that in form they might be sued for in an action of debt. The Statute of Fraudulent Devises was first amended by that of 11 Geo. 4, c. 47, which was soon after supplied by Sugden's Act.

[1] The student will find these statutes collected in Ram on Assets, 213.

[2] A striking difference has existed between the course of legislation on the different sides of the Atlantic, with respect to the liability of estates of decedents for the payment of their debts, and although the rules in the different States must necessarily be local in their application, yet it may, in general, be said that in this country lands are liable for the debts of a decedent, whether due by matter of record, specialty, or simple contract, and that in the two latter cases, although they create no lien during the debtor's life, yet by his death their quality is changed, and they become liens on the real estate, which descends to the heir, or passes to the devisee, subject to the payment of the debts of the ancestor, according to the local laws of the State.

of covenant; and, if a liquidated debt be secured by it, by an action of debt.(a) These remedies must be pursued within twenty years, except in cases of disability by reason of infancy, coverture, lunacy, or absence beyond seas, such being the period fixed by 3 & 4 W. 4, c. 42, s. 3,[1] which, being later in date though passed in the same session with 3 & 4 W. 4, c. 27, is held to have superseded some inconsistent provisions contained in that statute. See Strachan v. Thomas, 12 Ad. & Ell. 535; 40 E. C. L. R.; Paget v. Foley, 2 Bingh. N. C. 679; 29 E. C. L. R.

[*23] *Having thus touched on the general division of Contracts into those of Record, by Deed, and

(a) Debt thus lies for rent on any lease or demise by deed for life or lives, as well as upon leases for years; (8 Ann. c. 14, s. 4;) but not for arrears of an annuity or rent charge for life charged on lands of a freehold nature, so long as the estate of freehold continues, for the law will not suffer a real injury to be remedied by a personal action. Webb v. Jiggs, 4 M. & S. 113. Collateral covenants to pay such annuities fall within the same rule: there must be a direct duty on the part of the defendant to pay the plaintiff a liquidated sum to enable him to sue in debt. Randall v. Rigby, 4 M. & W. 130; 1 Wms. Saund. 282 y. Neither will it lie against a lessee after the assignment of a lease and acceptance of rent from the assignee, the privity of contract being destroyed by the assent to the assignment, otherwise it would lie even against an executor of a lessee, though he had assigned. See the notes to Thursby v. Plant, 1 Wms. Saund. 237. Debt lies also on bonds, whether to pay money or perform awards, on covenants in an indenture, on policies of insurance, charter parties, and mortgage deeds. See 3 & 4 W. 4, c. 42; 2 Wms. Saund. 62 b, n. f, g, & 402 a, and generally on recognizances, Gilb. Debt, 395.

[1] By these statutes a positive bar is interposed to a recovery upon specialties after twenty years. Before their passage, there was only the common law presumption of payment or performance, which was liable to be rebutted by testimony, and in this country it is believed that statutes similar to that of Will. 4, have not been generally enacted.

by Simple Contract, and explained the nature of a deed, and the formalities attending its execution,—having pointed out the distinction between the absolute delivery of a deed and the conditional one of an escrow, the distinction between a deed poll and indenture, the peculiar privileges of a contract by deed, whether in respect of the consideration, the estoppel it creates, the means by which its obligation is determined, or the rights which it confers upon a creditor against his debtor's assets,—having pointed out the remedy by which its non-performance is complained of in a court of law, and the time of limitation within which that remedy is to be pursued, it remains to point out in a similar manner the peculiarities attending Simple Contracts. This will be done in the next lecture.

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*LECTURE II. [*24]

THE NATURE OF SIMPLE CONTRACTS—OF WRITTEN CONTRACTS—THE STATUTE OF FRAUDS.

In the last lecture, I compressed the observations I had to make on the general nature of Contracts under Seal. I now arrive at the class denominated *Simple Contracts*, which comprises all of a degree inferior to deeds, whether they be verbal or written. For though, as I shall presently explain to you, there is in practice, a very wide distinction between *written* and *verbal* contracts, yet, in *theory*, the law of England acknowledges no difference between them at all, but denominates them all by the same term, *Simple Contracts*. And, indeed, they are so far alike that they all, whether verbal or written, are subject to those marks of inferiority

to contracts by deed which you heard described in the last lecture.

Thus, they do not create an estoppel: they are capable of being put an end to without the solemnity of a deed. They form no ground of action against an heir or devisee, even though he be expressly named in them, and they require a consideration to support and give them validity, though as I shall have occasion to explain [*25] *in a future lecture, there is one case, even among Simple Contracts, in which the consideration need not be shown, but is presumed to exist unless its existence can be disproved. In these respects, all simple contracts are like one another. But there are two great *practical* differences between written and verbal contracts, which it is necessary to explain at some length to you.

The first concerns *the mode in which they are to be proved.* And it results from an inflexible rule of the law of evidence, that when a contract is reduced into writing it shall be proved by the writing, and by that only; and that no *contemporaneous* verbal expressions shall be engrafted upon it for the purpose of altering, adding to, or taking away from its import. You will find this principle laid down and enlarged upon in all the treatises on Evidence; see, for instance, Phillipps, part ii. cap. 5,[1] where you will find the application of this rule very largely discussed. Indeed, there is hardly any one branch of the law which has given rise to so much subtle and anxious discussion and inquiry as this single rule of the law of Evidence. The present Vice Chancellor, Sir James Wigram, has, in one of the ablest treatises existing in our law libraries, discussed its application to the single head of Devises.

[1] And the notes of Messrs. Cowen and Hill to the American edition.

In applying this rule, therefore, you must take care not to be misled as to its meaning, for, as I *have just said, its consideration involves very subtle [*26] and nice distinctions. It would be impossible to do complete justice to these in the course of a lecture: still, however, I think that I can point out their nature, so far as to give you a notion of the sort of questions which are likely to arise, sufficient to prevent you from being taken by surprise by such questions, should they occur to you in practice.

Now, the rule itself, as I have said, is, that no *parol*, that is *verbal* evidence of what took place at the time of making a written contract(*a*) is admissible for the purpose of contradicting or altering it; for instance, if A. contract in writing with B. to deliver him 100 quarters of wheat within three months, at so much per quarter, no evidence would be admissible to show that the wheat was agreed, at the time, to be delivered only in case of the arrival of a ship which the vendor expected from Odessa with wheat *on board; [*27] for that would be, by verbal evidence, to turn an absolute written contract into a conditional one. So, if a promissory note (which, not being under seal, is, you must be aware, a simple contract) were made payable on one day, verbal evidence could not be ad-

(*a*) These rules of course apply exclusively to written and not parol contracts. An illustration of this occurred in the case of an auctioneer, who, at the time of a sale, verbally declared a variation from the printed catalogue; namely, that goods stated therein to be silver were only plated, and so sold them; the actual contract being a parol one, evidence of the parol statement was held admissible to explain it (Eden v. Blake, 13 M. & W. 614); but if the auctioneer had signed an agreement which referred to or formed part of the unaltered catalogue, then his parol declaration of the alteration could not be given in evidence, as it would vary a written contract. Shelton v. Livius, 2 Cr. & J. 411.

mitted to show that it was meant to be payable upon another. See Free v. Hawkins, 8 Taunt. 92, 4 E. C. L. R.; and see examples of the application of this principle in Hoare v. Graham, 3 Camp. 57; Hogg v. Smith, 1 Taunt. 347.[1]

[1] A vast number of authorities upon this much-discussed rule of evidence will be found in the digests and elementary treatises, among which may be particularly noticed the notes of Messrs. Cowen and Hill, to the American edition of Phillipps on Evidence, and the fifteenth chapter of Professor Greenleaf's treatise on that subject. A few only of the instances of the application or non-application of the rule can be noticed here. It has been enforced in the *exclusion* of evidence to show that a signature in one's own name was intended to be merely as agent, Stackpole v. Arnold, 11 Mass. 27; Hancock v. Fairfield, 30 Maine, 299; that a written agreement to deliver wheat to A. was modified by a parol direction to deliver it to B., Wolfe v. Myers, 3 Sandford's S. C. 7; Babcock v. May, 4 Hammond, 334; that a written agreement for the purchase of land, whereby the purchaser was not to cut timber, was varied by a parol license to cut it, Pierepont v. Barnard, 5 Barbour's S. C. R., 364; that a check purporting to be for so much money was designed to be payable in the notes of a certain bank, Pack v. Thomas, 13 Smedes and Marsh. 11; or on a contingency, Mosely v. Hanford, 10 Barn. and Cress. 729; Cunningham v. Wardwell, 3 Fairfield, 466; Erwin v. Sanders, 1 Cowen, 249, that a particular ship was verbally excepted from a policy of insurance on the fleet to which she belonged, Weston v. Emes, 1 Taunton, 115, that goods to be stowed under deck were verbally allowed to be stowed on deck, Creery v. Holly, 14 Wendell, 26 (it would have been different had the evidence been to prove *a custom* of storage in that manner, Baxter v. Leland, 1 Blatchford, 526, see infra, note to page 30). The rule, however, does not exclude the testimony of *experts* to aid in the reading of the instrument, or to explain a local or technical meaning, Wigram on Wills, 48; Sheldon v. Benham, 4 Hill, 129; Smith v. Wilson, 3 Barn. & Adolph. 728, 23 E. C. L. R.; Clayton v. Gregson, 5 Ad. & El. 302, 31 E. C. L. R.; The King v. Washiter, 6 Id. 153, 33 E. C. L. R.; Piesch v. Dixon, 1 Mason, 11; unless, indeed, the words have a known legal meaning, Firth v. Barker, 2 Johns. 335. Nor does it exclude the admission of the cotemporaneous *writings* relating to the subject-matter, Bowenbank v. Monteiro, 4 Taunton, 846; Hunt v. Livermore, 5 Pick. 395;

But, though you are not allowed to show that the meaning of a written contract was varied by the words,

Bell v. Bruen, 1 Howard, 169; Thomas v. Austin, 4 Barb. S. C. R. 265, nor evidence to show the circumstances surrounding the parties at the time, Haigh v. Brooks, 10 Ad. & Ell. 309; Goldshede v. Swan, 1 Excheq. 154; Bainbridge v. Wade, 1 Eng. Law & Eq. R. 236; Smith v. Bell, 6 Peters, 75; Wooster v. Butler, 13 Connecticut, 309; Knight v. New Eng. Worsted Co., 2 Cushing, 271–283; Lowrie v. Adams, 22 Vermont, 160, for all this, it is said, tends to *explain*, and not to contradict the writing. And it is obvious that evidence is admissible to show that the writing never was of any validity, as by reason of fraud, illegality, duress, incapacity of parties, &c., for those grounds, as has been shown in the preceding chapter, vitiate the contract *ab initio*, and to exclude evidence of this, would be to promote and not to repress injustice.

But upon the ground that parol evidence is admissible to explain in cases of *fraud*, the courts of Pennsylvania have gone very far, and have in effect taken the position that when the written contract has been entered into with the understanding that it is to be used in a particular way, or with a particular qualification, it is a fraud to violate this understanding. And hence many cases have sanctioned the admission of evidence to show what was the understanding at the time the contract was made. "If the rule is," it was said, in Bollinger v. Eckert, 16 Serg. & Rawle, 424, "that parol evidence is admissible to correct mistake or fraud, and if the real contract of the parties is not expressed in the writing, this must arise from mistake or fraud. We seem now to have settled down in this; whatever material to the contract was expressed and agreed to when the bargain was concluded and the article drawing, may, if not expressed in the article, be proved by parol." "Ever since the case of Hurst v. Kirkbride, cited 1 Binney, 616," as was said in Oliver v. Oliver, 4 Rawle, 141, "it has been the practice to receive parol evidence of what passed at the time of the execution of deeds, or at and before the execution. When the fairness of the transaction is impeached, it is immaterial whether the party intended a fraud at the time of the contract, or whether the fraud consists in the fraudulent use of the instrument. Hulse v. Wright, 16 Serg. & Rawle, 345; Lyn v. Huntingdon Bank, 14 Id. 283; Thomson v. White, 1 Dallas, 424, are of this description," and many other cases have, while regretting the extent of the innovation, followed it; Partridge v. Clark, 4 Barr, 166; Renshaw v. Gans, 7 Id. 119; Remick v. Swinehart, 1 Jones, 238. But

at the time of making it, there are some cases in which you *may* show that it was *subsequently so varied.*

in the most recent case on the subject, Remick's Executors v. Remick, 3 Harris, 66, the Court evinced the strongest disposition to sanction the admission only of *cotemporaneous* evidence, and to apply the strict rule in the exclusion of parol statements occurring *previously* to the transaction. "In the somewhat unsteady course of decision upon this vexed point of evidence," said Bell, J., who delivered the opinion of the Court, "if any principle has been adhered to with tenacity, it is, that oral proof to vary or affect a written instrument must be confined to what occurred at the execution of it. Billinger v. Eckert, 16 Serg. & Rawle, 424; Stine v. Sherk, 1 Watts & Ser. 195. Even thus restricted, it is acknowledged to be full of danger. Were the door opened still wider for the admission of all the loose dicta of the parties, running, it might be, as in this instance, through a long course of years, the flood of evil would become so great as to sweep before it every barrier of confidence and safety, which human forethought, springing from experience, is so sedulous to raise against the treachery of memory and the falsehood of men. To avoid, therefore, what would really be a social calamity, it is recognised as a settled maxim, that oral evidence of an agreement or understanding between parties to a deed or other written instrument, entertained before its execution, shall not be heard to vary or materially affect it. Cozens v. Stevenson, 5 Ser. & Rawle, 421; Gilpin v. Consequa, 1 Peter's C. C. Rep. 85; S. C. 3 Wash. C. C. Rep.; M'Kennan v. Henderson, 1 Pa. Rep. 417. Accordingly, the settled rule is, that when a contract has been reduced to writing, it is understood as expressing the final conclusions of the contracting parties, and fully accepted as merging all prior negotiations and understandings, whether agreeing or inconsistent with it. Lighty v. Shorb, 3 Pa. Rep. 450; Monongahela Nav. Co. v. Fenlon, 4 Watts & Ser., 207, 209. If any dicta or even decision in hostility to this axiom are to be found, they must be ascribed to the strong desire we are all apt to be swayed by, to defeat some strongly suspected fraud in the particular case. But these occasional aberrations but lead to the more emphatic reannunciation of a principle found to be essential to the maintenance of that certainty in human dealings, without which commerce must degenerate into chicanery, and trade become but another name for trick."

The line of decision taken in Pennsylvania admitting such evidence on the ground of fraud has not, it is believed, been generally observed elsewhere, and in a note to Woolam v. Hearn, 2 White's

There are cases in which the contract is of a description which is not required by law to be reduced into writing at all; thus if, in consideration of £50, I promise to go to York on the 1st day of January, and that contract be reduced to writing, verbal evidence would not be admissible, to show that it was agreed *at the same time*, that the contractee was to be at liberty, on payment of £10, to substitute Edinburgh for York, but verbal evidence *would* be admissible to show that it was next day agreed that, on payment of £10 he might, if he pleased, substitute Edinburgh for York; for, as there is no rule of law which requires such a contract to be reduced to writing, we might have made it by mere words, and are therefore allowed to give verbal evidence—not that the written *contract did not contain the intention of the [*28] parties at the time of drawing it up—but that they *subsequently* altered a part of it by words, and so, in fact, made *a new agreement*.[1] But, though this may be done where the contract is one which the law does not require to be in writing, yet, where a writing is necessary, it cannot be allowed; for if it were, the effect of the verbal evidence would be to turn a contract which the law requires to be in writing into one partly in writing, and partly in words; and therefore, in Goss v. Lord Nugent, 5 B. & Ad. 56, 27 E. C. L. R., it was decided that a contract for the purchase of land (which, by the Statute of Frauds, is required to be

Equity Cases, 561, Am. Ed., the student will find the authorities collected and commented on.

[1] Jeffrey v. Walter, 1 Starkie, 267; Wright v. Crooks, 1 Scott's N. S. 685; Cummings v. Arnold, 3 Metcalf, 486; Robinson v. Bachelder, 4 New Hamp. 40; Keating v. Price, 1 Johns. Cas. 22; Dearborn v. Cross, 7 Cowen, 50; Frost v. Everett, 5 Cowen, 497; Yonqua v. Nixon, 1 Peters C. C. R. 221; Boyd v. Bertrand, 2 English, 321.

written) cannot be altered by a subsequent verbal arrangement.(*a*)[1]

Another celebrated distinction on this subject is, that in a written contract, or, indeed, in any other written instrument, if there be a *patent ambiguity*, it never is allowed to be explained by verbal evidence, although a *latent ambiguity* is so. The meaning of the expressions *patent* and *latent*, with reference to this subject, is as follows:—

A *patent ambiguity* is one which appears on the face of the instrument itself, and renders it ambiguous and unintelligible, as if in a will there were a blank left for the devisee's name.

[*29] *A *latent* ambiguity is where the instrument itself is on the face of it intelligible enough, but a difficulty arises in ascertaining the identity of the subject-matter to which it applies, as if a devise were to *John Smith*, without further description. In that case the devise would be intelligible enough on the face of it, and if there were only one John Smith in being, no difficulty could arise. But as there are several thousands, it would be impossible to tell which of them was meant without admitting verbal evidence, which would accordingly be admitted. This would be what is called a latent ambiguity, because it would not appear on the face of the instrument, but would lie hid till evidence had been produced showing that there

(*a*) Both acts and words are inadmissible to vary a written contract, though the parties have acted on the verbal alteration for some years. Giraud v. Richmond, 15 Law Jour. C. P. 180.

[1] The same point was decided, on the authority of Goss v. Lord Nugent, in the late case of Marshall v. Lynn, 6 Mees. & Welsby, 109, with respect to a contract for the sale of goods falling within the operation of the same statute. So in Blood v. Goodrich, 9 Wendell, 68.

was a great number of persons corresponding in name with the devisee.

There is one exception, indeed, engrafted on the rule which forbids the reception of evidence for the purpose of qualifying the sense of a written contract; it occurs where parties have contracted with reference to some known and established usage. In such cases the usage is sometimes allowed to be engrafted on the contract, in addition to the express written terms: for examples of this you may refer to Wigglesworth v. Dallison, Doug. 201; Udhe v. Walters, 3 Camp. 16; Powell v. Horton, 2 Bingh. N. C. 668, 29 E. C. L. R.; and the judgment of Baron Parke in *Hutton v. Warren, 1 Mee. & Welsb. 474.(*a*)[1] Yet, even [*30]

(*a*) The usage is in fact the key to the contract, without reference to which the intent of the parties could not be ascertained. This principle has perhaps been carried to its fullest limit in the case of The Queen v. Stoke-upon-Trent, 5 Q. B. 303, 48 E. C. L. R., where the terms of contract of hiring were as follows: "Plate and dish-workers. This day agreed with Ralph Bourne to serve Messrs. ——, from &c. to &c., at prices good out of oven, as per opposite side. *We agree to lose no time on our own account*, to do our work well, and behave ourselves in every respect as good servants. Witness," &c. Evidence was held admissible to show that holidays were so customary that the contract must be supposed to have reference to them; although the terms of hiring were quite general, and the stipulation to lose no time certainly does

[1] Thus, in Coit v. Ins. Co., 7 Johns. 385, evidence was admitted to show that, by general understanding, the word "*roots*," in New York policies of insurance, was limited to roots perishable in their own nature, and therefore excluded sarsaparilla; and in Astor v. Ins. Co., 7 Cowen, 202, the usage of traders in *furs* and *skins* was admitted to show the meaning of those words in a policy; and other instances in which usage was similarly permitted, by way of explanation, will be found in Taylor v. Briggs, 2 Car. & Payne, 525; Smith v. Wilson, 3 Barn. & Adolph. 728; Baker v. Ludlow, 2 Johns. Cases, 289; Macy v. Ins. Co., 9 Metcalf, 362; Putnam v. Tillotson, 13 Id. 517; Eyre v. Ins. Co., 5 Watts & Serg. 116; Allegre v. Ins. Co., 6 Harris & Johnson, 408; Allegre's Adm'rs. v. Mary-

in these cases, the Courts never admit of a usage *inconsistent* with the written contract; for "usage" (says

not favour the supposition. [And see as to this, Hutton v. Locke, 5 Hill, 437.] A safer rule, perhaps, is that laid down in Lewis v. Marshall, 8 Scott. N. R. 846, that is to vary the ordinary meaning of plain words, the evidence of usage must be clear and irresistible. But parol evidence of usage may always be given to assist the interpretation of terms peculiar to a trade, and the sense they attach to them (Spicer v. Cooper, 1 Q. B. 424, 41 E. C. L. R.), or the meaning of cant phrases, Evans v. Pratt, 3 M. & Gr. 759, 42 E. C. L. R. Extrinsic evidence may, on the same principle, be given to explain contracts otherwise unintelligible, by showing the situation of parties at the time it was made, provided the terms of the contract be not varied (Sweet v. Lee, 3 M. & Gr. 466, 42 E. C. L. R., per Tindal, C. J.); or even to show the former transactions between the same parties, which may throw light on the terms of the contract. 11 Clarke & Fin. 45. See also Trueman v. Loder, 11 Ad. & Ell. 596, 39 E. C. L. R., per Lord Denman, C. J.

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land Ins. Co., 2 Gill & Johns. 136. So, in a late case, where a vessel was libelled for freight of flour, the respondents proved that it had been damaged by being stowed in the hold, on the top of moist sugar, and the libellants were permitted to show an established custom of storage in general ships from New Orleans to the northern ports—"it being, of course, well understood by the respondents that their flour would be thus shipped, unless they gave instructions to the contrary they must be deemed to have assented to the mode of shipment." Baxter v. Leland, 1 Blatchford, 526. Evidence of a usage is not, however, admissible when the meaning is certain, and not doubtful, Gross v. Criss, 3 Grattan, 262; Macomber v. Parker, 13 Pick. 176; Brown v. Brown, 8 Metcalf 577; Sleght v. Rhinelander, 1 Johnson, 92, reversed on another point in 2 Id. 531; nor where it will contradict the written contract, as where a policy was made in the usual form upon the ship, her tackle, apparel, boats, &c., evidence of usage that the underwriters never pay for the loss of boats slung on the quarter was held inadmissible; Blackett v. Insurance Co., 2 Crompton & Jervis, 244; and to the same effect are Sch. Reeside, 2 Sumner, 568; Turney v. Wilson, 7 Yerger, 340; Allen v. Dykers, 3 Hill (N. Y.), 593; Hinton v. Locke, 5 Id. 437. And it has also been said that a usage will not be recognised in a court of law unless it be reasonable, and adapted to increase trade and promote fair dealing

Lord Lyndhurst in Blackett v. R. E. Insurance Co., 2 Tyrwh. 266), may be admissible "to *explain* what is doubtful,* but is never admissible to contradict what is plain." See also Yeates v. Pym, 6 Taunt. 445, 1 E. C. L. R., and Roberts v. Barker, 1 C. & Mee. 808.(*a*) [*31]

The other point to which I alluded as constituting an important practical distinction between Simple Contracts by mere words and by writing is, that there are several matters which, although they are capable of becoming the subjects of *Simple Contract*, cannot, nevertheless, be contracted for without *writing*. So that a simple contract about those matters would be available if written; unavailable, if oral.

By far the most important class of contracts subject

(*a*) In the words of Mr. Baron Alderson, in the subsequent case of Clarke v. Roystone, 13 M. & W. 757, "Where a stipulation is inconsistent with the custom of the country, the contract must prevail, and the custom of the country must be excluded." In these cases it appears to be simply a question whether the words of the contract themselves sufficiently disclose the import of the contract; if so, no custom can vary it, and no evidence of custom is admissible. See Ford v. Yates, 2 M. & Gr. 549, 40 E. C. L. R.; Charlton v. Gibson, 1 Car. & Kir. 541, 47 E. C. L. R., per Cresswell, J.; Hewson v. Cooper, 3 Scott, N. R. 48; Clifford v. Turrell, 6 Jurist, 5, & 921, V. C. Bruce.

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between the parties. Marcy v. Ins. Co., 9 Metcalf, 363; Bowen v. Stoddard, 10 Id. 381. The student will find the cases upon this subject collected, and the distinctions carefully noticed, in the American note to Wigglesworth v. Dallison, 1 Smith's Leading Cases, 588. The later cases show a disposition rather to restrain than to enlarge the introduction of such evidence (Donnell v. Columbia Ins. Co., 2 Sumner, 377); and under any circumstances it is said that a usage must not be proved by isolated instances, but be so certain, uniform, and notorious that it must probably have been understood by the parties as entering into the contract; Cope v. Dodd, 1 Harris (Pa.), 33; Nichols v. De Wolf, 1 Rhode Island, 277.

to this observation are those falling within the enactments of the *Statute of Frauds*. And these are of such constant recurrence in practice, that it will be right to devote some time to their consideration.

The Statute of Frauds, as it is called, was passed in the twenty-ninth year of the reign of Charles II., and is the 3d cap. of the statute-book of that year. It is said to have been the joint *production of Sir [*32] Matthew Hale, Lord Keeper Guilford, and Sir Leoline Jenkins, an eminent civilian. The great Lord Nottingham used to say of it "*that every line was worth a subsidy*;"[1] and it might now be said, with truth, that every line has *cost* a subsidy, for it is universally admitted that no enactment of any legislature ever became the subject of so much litigation. Every line, and almost every word of it, has been the subject of anxious discussion, resulting from the circumstances that the matters which its provisions regulate are those which are of every-day occurrence in the course of our transactions with one another.

The chief object of passing the statute was to prevent the facility to frauds and the temptation to perjury held out by the enforcement of obligations depending for their evidence upon the unassisted memory of

[1] But in Lord Nottingham's MS. report of the case of Ash v. Abdy (1678), printed in 3 Swanst. 664, he remarks: "And I said that I had some reason to know the meaning of this law, for it had its first rise from me, who brought the bill into the Lords' House, though it afterwards received some additions and improvements from the judges and civilians." In Gilbert's Reports in Eq. 171, "Sir Matthew Hale and Sir Lionel Jenkins, who prepared this statute," are referred to, but Lord Mansfield, in Windham v. Chetwynd, 1 Burr. 418, doubted Lord Hale's authorship of the statute, as "it was not passed till after his death, and was brought in, in the common way, and not upon any reference to the judges," and Lord Campbell, in his Lives of the Chancellors, refers to the statute as deserving more praise for its general design, than for the manner in which it was executed; vol. 3, p. 418.

witnesses. How great this temptation and facility were is obvious; and accordingly the statute, in the first section, declares its own enactment to be "for the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury;" and then it goes on to provide for various cases in which it was apprehended that such practices were likely to occur; thus the *first* of the twenty-five sections of which it consists is levelled at parol conveyances of land, and contains the celebrated enactment, of which you have doubtless often heard, that they *shall create estates at will only, except in the case of leases not exceeding [*33] three years, and reserving two-thirds of the annual value as rent, which are excepted by the second section.[1]

The *third section* is levelled at parol assignments, grants, or surrenders; the *fifth*, at unattested devises; the *sixth*, at secret revocations or devises; the *seventh*, at *parol* declarations of trust; the *nineteenth* and *twentieth* against *nuncupative* wills of personalty; and the *twenty-first* against verbal alterations in written wills.

But the two sections which mainly affect *contracts*, and which, consequently, are chiefly important to the subject of this lecture, are the *fourth* and the *seventeenth*.

The 4th section enacts: "That *no action* shall be brought to charge any executor or administrator, upon any special promise, to

[1] It may be remarked, that it has been held in Pennsylvania and North Carolina, that these provisions of the Statute of Frauds do not, in those States, apply to trust estates, but that parol evidence is admissible to show that a conveyance, absolute on its face, is in fact a trust for another; Murphy v. Hubert, 7 Barr, 420; Wetherill v. Hamilton, 3 Harris, 198; Freeman v. Freeman, 2 Parsons' Eq. Ca. 81, Blackwell v. Ovenby, 6 Iredell's Eq. 38; though it has been also said that the evidence to this effect should be entirely free from doubt; Tritt v. Crotzer, 1 Harris, 451.

answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The contracts provided for by this section are, therefore, as you will have observed—

1st. Promises by an *executor* or *administrator* to answer damages out of his own estate.

[*34] *2d. Promises to answer for the *debt, default,* or *miscarriage of another person.*

3d. Agreements made in consideration of *marriage.*

4th. Contracts or *sales of lands,* tenements, or hereditaments, or any interest in or concerning them.

5th. Agreements *not to be performed within the space of a year* after the making thereof.

The latter part of the section applies equally to each of these five sorts of contract, which are equally prohibited from being made the subject-matter of action, unless the *agreement,* or some note or *memorandum* of it, shall be in writing signed by the party to be charged, or some person thereunto by him lawfully authorized.

Now it has been decided (and the decision, you will observe, is equally applicable to each of the five descriptions of contract), that, in consequence of the introduction of the word "*agreement,*" the *consideration* (*a*) as well as the *promise* must appear in writing. That was settled by the well-known cases of Wain v. Warlters, 5 East, 10; Saunders v. Wakefield, 4 B. & A. 595,

(*a*) See further of "Consideration," Lect. IV., post.

24 E. C. L. R.; and Jenkins v. Reynolds, 3 B. & B. 14, 7 E. C. L. R. For the word *agreement*, comprehending what is to be done on both sides, comprehends, of course, the *consideration* for the promise as well as the *promise* itself. The judgment of Lord Ellenborough *in Wain v. Warlters very clearly explains the reason upon which this doctrine is founded. [*35]

"The clause in question in the Statute of Frauds," says his lordship, "has the word *Agreement* ('*unless the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing,*' &c.); and the question is, Whether that word is to be understood in the loose, incorrect sense in which it may sometimes be used, as synonymous to promise or undertaking, or in its more proper or correct sense, as signifying a mutual contract, on consideration, between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect: the more so when it is considered by whom that statute is said to have been drawn, by Lord Hale, one of the greatest judges who ever sat in Westminster Hall, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another, is to be charged, in the form of the proceeding against him, *upon his special promise;* but, without a legal *consideration* to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid, merely because it was put in writing. The obligatory part is indeed the promise, which will account for the word promise being used in the first part of the clause; but still, in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood the *agreement* in respect of which the promise was made, must be reduced into writing. And, indeed, it seems necessary for effectuating the object of the statute, that the consideration should be set down in writing, as well as the promise; (*a*) for, otherwise, the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards *be able to prove, the omission of which would materially vary the promise, by turning [*36]

(*a*) The consideration must thus not only appear, but it must be sufficient. See French v. French, 2 M. & Gr. 644, 40 E. C. L. R., where all the cases are noted, p. 649, n. (*b*).

that into an absolute promise which was only a conditional one; and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the Act to exclude, by requiring that the *agreement* should be reduced into writing, by which the consideration as well as the promise would be rendered certain.[1]

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[1] Although Wain v. Warlters has been sometimes doubted in England (ex parte Minet, 14 Ves. 190, ex parte Gardom, 15 Id. 286), yet its authority has long been there considered as unquestioned; Saunders v. Wakefield; Jenkins v. Reynolds, supra; Morley v. Brothby, 3 Bingham, 107; Newbury v. Armstrong, 6 Id. 201; Raikes v. Todd, 8 Adolph. & Ellis, 448; Semple v. Pink, 1 Exchequer, 74; Price v. Richardson, 15 Mees. & Welsby, 539; Bewley v. Whitford, 1 Hayes (Irish Exch.), 356. In this country its authority has been acknowledged in New Hampshire, New York, Maryland, Georgia, and perhaps New Jersey; Neelson v. Sandborne, 2 New Hampshire, 414; Sears v. Brink, 3 Johns. 210; Elliott v. Geisse, 7 Harris & Johnson, 457; Wyman v. Gray, Id. 409; Henderson v. Johnson, 6 Georg. 390; Buckley v. Beardslee, 2 Southard, 570 (though see Lea v. Lea, Spencer, 337), but in most of the States (in some of which the word *promise* is substituted for or introduced with the word *agreement*, see Taylor v. Ross; Violet v. Patten, infra) it is held, in opposition to Wain v. Warlters, that the consideration need not appear from the instrument, but may be shown by parol; Packard v. Richardson, 17 Mass. 122, where is an elaborate opinion by Parker, Ch. J.; Bean v. Burbank, 16 Maine, 460; Cummings v. Dennett, 26 Id. 397; Gillighan v. Boardman, 29 Id. 79; Sage v. Wilcox, 6 Connect. 81; Smith v. Ide, 3 Vermont, 290; Fyler v. Givens, Riley's Law Cases (S. C.), 56, (in effect overruling Stevens v. Winn, 2 Nott & M'Cord, 372, note *a*); Reed v. Evans, 17 Ohio, 128; Pearce v. Wren, 4 Smedes & Marshall, 91; Taylor v. Ross, 3 Yerger, 330; Violet v. Patten, 5 Cranch, 142. The revised statutes of New York, in re-enacting the fourth section of the Statute of Frauds, altered it by requiring that the agreement should itself express the consideration, and this was at first held to require that the consideration should be expressed in terms, and not by implication, in the instrument itself, and without aid from reference to any other; Smith v. Ives, 15 Wendell, 182; Packer v. Wilson, Id. 343; Newcomb v. Clark, 1 Denio, 226; Bennett v. Pratt, 4 Id. 275. But later cases have relaxed this rigidness of construction, and it seems

There is another observation applicable to all the five cases provided for by this section of the statute, namely, that the *Agreement*, the meaning of which word I have just explained, need not be contained in a single writing, but may be collected from several. You will find that established by Jackson v. Lowe, 1 Bing. 9, 8 E. C. L. R.; Phillimore v. Barry, 1 Camp. 513; Dobell and Hutchison, 3 Ad. and Ell. 359, 30 E. C. L. R., and other cases. But though, where there are several papers, the agreement may be collected from them all, provided they are sufficiently connected in sense among themselves, so that a person looking at them all together can make out the connexion and the meaning of the whole, without the aid of any verbal evidence; (*a*) yet it is otherwise when *such connexion does not appear on the face of the writings themselves, for to let in verbal evidence in [*37]

(*a*) It must at least appear by necessary implication. See, also, Morley v. Boothby, 3 Bing. 107, 11 E. C. L. R.; Bentham v. Cooper,

now settled that it is sufficient if the consideration, expressed with reasonable certainty, appear in writing in any form; Staats v. Howlett, 4 Denio, 359; Union Bank v. Costen, 3 Comstock, 203. The fourth section of the Statute of Frauds never was re-enacted in Pennsylvania. Wain v. Warlters forms one of the leading cases compiled by Mr. Smith, and the student may be profitably referred to the notes both of himself and of the American editor upon it. 2 Lead. Cas. 245. It should be noted, that although the authority of Wain v. Warlters requires that the consideration should appear in writing, yet it is not necessary that the declaration should set forth every circumstance sufficient to take the case out of the statute; for the consideration might, for example, appear from the tenor and result of a long train of correspondence, the inference from which should be for the jury, and if these letters were necessarily to be set forth, and the inference to be deduced by the pleader, great difficulties would be imposed on plaintiffs who had to make out a case not within the statute, if an omission of any one circumstance necessary to take it out of the statute might be pleaded in bar. Lilly v. Hewitt, 11 Price, 501; Etting v. Vanderlyn, 4 Johns. 237, and see infra, note (*b*) to p. 40.

order to connect them, would be to let in the very mischief which it was the object of the framers of the Act

5 M. & W. 621; Sykes v. Dixon, 9 Ad. & Ell. 693, 36 E. C. L. R.; Kennaway v. Treleavan, 5 M. & W. 498.

Bought and sold notes will satisfy the statute if they agree, even though they may differ from the entry of the sale to which they relate in a broker's book; but when they differ in any material respect, there is no contract. Gregson v. Ruck, 4 Q. B. 737, 45 E. C. L. R.; Thornton v. Meux, 1 Mood. & M. 43, 22 E. C. L. R.; Levewright v. Archibald, 15 Jurist, 947, 6 Eng. Law and Eq. 286. Some conflict of judicial opinion exists whether, when the bought and sold notes disagree in a material point, an entry in the broker's book, signed by him, is sufficient evidence of the contract to satisfy the statute: Abbott, C. J., and Ld. Ellenborough, C. J., have both held that it is, on the ground that the "broker is the agent of both parties, and as such may bind them by signing the same contract on behalf of the buyer and seller." Grant v. Fletcher, 5 B. & Cr. 436, 11 E. C. L. R.; Heyman v. Neale, 2 Camp. 337; Groom v. Aflalo, 6 B. & Cr. 117, 13 E. C. L. R. The reverse was held in Hawes v. Forster, 1 M. & Rob. 368. Lord Abinger, C. B., however, held that whenever the bought and sold notes materially differed, the entry in the broker's book would not satisfy the statute, "unless it can be shown that the broker's book was known to the parties." See Thornton v. Charles, 9 M. & W. 802, which appears to be the law on this point.[1]

[1] Hawes v. Foster was explained in Thornton v. Charles, and in Pitt v. Beckett, 13 Mees. & Wels. 743, and Sivewright v. Archibald, 6 Eng. Law & Eq. R. 294, in the first of which cases Mr. Baron Parke said, "The jury found that the bought and sold notes were evidence of the contract, but on the ground that those documents having been delivered to each of the parties after signing the entry in the book, constituted evidence of a new contract made between the parties on the footing of those notes. The case may be perfectly correct, but it does not decide that if the bought and sold notes disagree, or there be a memorandum in the book made according to the intention of the parties, that memorandum signed by the broker would not be good evidence to satisfy the Statute of Frauds," and, in Sivewright v. Archibald, Mr. Justice Patteson said that his own note of Hawes v. Foster (he having been a member of the Court which granted the new trial) was in entire conformity with that explanation. All the authorities were considered in Sivewright v. Archibald, and Grant v. Fletcher was there affirmed,

to avoid, namely, the uncertainty and temptation to falsehood occasioned by allowing the proof of the contract to depend on the recollection of witnesses: and, therefore, where a written agreement is required by the fourth section of the statute, it is clear that several writings, not bearing an obvious connexion *inter se* in sense, cannot be joined together by verbal evidence to make up the agreement. This was one of the points decided in the great case of Boydell v. Drummond, 11 East, 142, where the plaintiff proposed to publish an edition *of Shakspeare with splendid engravings, and issued a prospectus stating the [*38] terms. A copy of the prospectus lay in his shop, and beside it lay a book headed "*Shakspeare Subscribers; their Signatures:*" but there was nothing in the book about the prospectus, or in the prospectus about the book. The defendant had signed the book, and, having afterwards refused to continue taking in the Shakspeare, the plaintiff brought an action against him. Now, the Shakspeare was not to be finished for some years, and therefore the case was one of those provided for by the fourth section of the Statute of Frauds, falling within the words "any agreement that is not to be performed within one year from the making thereof." It was therefore necessary that it should be in writing, and that that writing should be "*signed* by the party to be charged, or his agent." Now, the terms of the agreement were in the *prospectus*, and so far the statute had been complied with; but the *signature*, unluckily, was in the book, and the Court held that, as the pro-

though it was said that it was now usual for the broker, in order to save himself trouble, not to enter and sign any contract in his books, and still send the bought and sold notes as before, (which was the fact in that case), and there being a variance between the notes, the Court was divided as to their effect.

spectus did not refer to the book, or the book to it, the statute had not been complied with, and the contract could not be enforced.

"If," said J. Leblanc, "there had been anything in that book which had referred to the particular prospectus, that would have been sufficient; if the title to the book had been the same with that of the prospectus, it might perhaps have done: but, as the signature now stands, without reference of any sort to the prospectus, there was [*39] nothing *to prevent the plaintiff from substituting any prospectus, and saying that it was the prospectus exhibited in his shop at the time, to which the signature related: the case therefore falls directly within this branch of the Statute of Frauds."

There is a third point common to all the five contracts mentioned in the fourth section; it is with regard to the signature. The words are, you will recollect, "*Signed by the party to be charged* therewith, or some other person thereunto by him lawfully authorized." The signature to be that of the party *to be charged;* and therefore, though as I have pointed out to you, both sides of the agreement must appear in the writing, the consideration as well as the promise, it is not necessary that it should be signed by both the parties; it is sufficient if the party suing on it is able to produce a writing signed by the party whom he is seeking to *charge;* that was the point decided in Laythoarp v. Bryant, 2 Bing. N. C. 744, 29 E. C. L. R. (*a*)[1]

(*a*) And if a contract already exists, binding one party, any subsequent note signed by the other party, which includes or refers to the terms of the same contract, is equally binding. Dobell v. Hutchinson, 3 Ad. & Ell. 355, 30 E. C. L. R.

It matters not whether the signature be placed at the top or else-

[1] As it was in Penniman v. Hartshorne, 13 Mass. 87; Hawkins v. Chace, 19 Pickering, 502; Balland v. Walker, 3 Johns. Cases, 60; Clason v. Bailey, 14 Johns. 487; Douglass v. Spears, 2 Nott & M'Cord, 207; Anderson v. Harold, 10 Ohio, 399; Smith v. Smith, 8 Blackford, 208.

*The last point I shall mention common to all the contracts falling within *this* section regards the consequence of non-compliance with its provisions.(*a*) This consequence is, not that the unwritten contract shall be void, but that *no action shall be brought* to charge the contracting party by reason of it.(*b*) And cases may occur, in which the contract may be made available without bringing an action on it; and in which, consequently, it may, though unwritten, be of some avail. Thus, for instance, if money have been paid in pursuance of it, that payment is a good one for all purposes: for instance, in Griffith v. Young, 12 East, 513, where 100*l.* was paid by the incoming tenant to the outgoing one, partly for himself, [*40]

where in the document, so that the intention to sign it be clear. Johnson v. Dodgson, 2 M. & W. 653; [Penniman v. Hartshorne, 13 Massachusetts, 90. By the New York Revised Statutes the memorandum must be *subscribed;* and it is held, therefore, that a signature elsewhere than at the bottom or end of the writing is insufficient to satisfy the statute as thus varied. Davis v. Shields, 26 Wendell, 341.] But it is essential that it should have been signed before an action is commenced to enforce it, or there would be no good contract, and therefore no cause of action at the time it was brought. (See Bill v. Baiment, 9 M. & W. 36, which decides the doubt in Fricker v. Tomlinson, 1 M. & Gr. 773, 39 E. C. L. R.)

(*a*) The seventeenth section differs in this respect. (See infra, p. 70.)

(*b*) It is not necessary in pleading to declare that the promise was in writing; it is sufficient to show that it was so (2 Salk. 519); neither must the defendant who relies on the fact that there was no written note, plead that defect specially: he may give evidence of it under the general issue, which is a denial of the matters of fact from which the law implies a contract. Therefore, a special plea, that the Statute of Frauds had not been satisfied, would be demurrable as an argumentative denial of the contract itself. Leaf v. Tuton, 10 M. & W. 393; Buttemere v. Hayes, 5 M. & W. 456. See also Maberly v. Sheppard, 10 Bing. 99, 25 E. C. L. R.; and Baldey v. Parker, 2 B. & C. 44, 21 E. C. L. R.

and partly for the landlady, in pursuance of a verbal agreement. The incoming tenant refused to pay the landlady her share, saying that there was no writing, [*41] and that words *were but wind. The landlady brought her action, and Lord Ellenborough nonsuited her, on the ground that the agreement, being for an interest in land, ought to have been in writing; but the Court of Queen's Bench set aside the nonsuit, with Lord Ellenborough's own concurrence.[1]

I have now pointed out to you the matters in which all simple contracts agree, and the practical differences which exist between the effect of *written* and that of *verbal contracts*, although in theory both sorts fall within the denomination *Simple Contracts*. I have described the consequences which follow from the rules of evidence upon the reduction of any contract whatever into writing, and I have begun to describe those consequences which follow from the provisions of the Statute of Frauds, in the cases to which it is applicable. But as it is impossible to finish the consideration of that statute this evening, I shall proceed with it in the next lecture.

[*42] *LECTURE III.

THE STATUTE OF FRAUDS—PROMISES BY EXECUTORS AND ADMINISTRATORS — GUARANTEES — MARRIAGE CONTRACTS — CONTRACTS FOR THE SALE OF LANDS — AGREEMENTS NOT TO BE PERFORMED IN A YEAR.

In the last lecture I began the consideration of those species of contracts which, according to the fourth section of the Statute of Frauds, must be evidenced by writing.

[1] To the same effect is Philbrook v. Belknap, 6 Vermont, 383.

I touched on the points which equally apply to each of those five species, those namely which regard the appearance in the writing of the consideration as well as the promise, the *signature* which the statute requires, and the consequences of not reducing to writing contracts which the statute requires should be so evidenced. It remains, before terminating the consideration of that section of the Act, to say a few words upon each of the five particular species of contracts to which it applies.

The first is—*any special promise by an executor or administrator to answer damages out of his own estate.*

The principal case on this subject is Rann v. Hughes, which went up to the House of Lords, and is reported in 7 Bro. P. Ca. 556, and 7 T. R. *350 n. The [*43] point decided in that case is, that the Statute of Frauds in no manner affected the validity of such promises, or rendered them enforceable in any case in which at common law they would not have been so; but merely required that they should be reduced to writing, leaving the written contract to be construed in the same manner as a parol contract would have been had there been no writing. The opinion of the judges was delivered to the House of Lords by L. C. Baron Skynner, and is extremely instructive. (*a*)

(*a*) It is thus essential that the consideration for the promise of the executor and administrator should appear, which consideration, as we shall afterwards see under the title of Parties to Contracts, must be other than that which attached to the original liability: it is, in fact, a new contract between new parties, for the executor is nowise bound to perform the contracts of his testator *de bonis propriis*, and, therefore, his promise to do so must be supported by a new consideration. Forbearance to sue an executor for some definite time for a debt due from the testator is a sufficient consideration for a promise by the executor to pay it, although there be no assets. 1 Rol. Abr. 24, pl. 33; Hawes v. Smith, 2 Lev. 122 (see Deeks v. Strutt, 5 Term, 693). The proving of his debt by the creditor, at the re-

[*44] The next species of promise mentioned in the *fourth section is "*Any special promise to answer for the debt, default, or miscarriage of another person.*"

This includes all those promises which we ordinarily denominate *guarantees*, and has given rise to a very great deal of discussion.

In the first place, it has been decided that the sort of promise which the statute means, and which must be reduced to writing, is a promise to answer for the *debt, default, or miscarriage of another person, for which that other person himself continues liable.* Thus, if A. go to a shop, and say, "Let B. have what goods he pleases to order, and if he do not pay you, I will," that is a promise to answer for a debt of B. for which B. himself is also liable, and, if it be sought to enforce it, it must be shown to have been reduced to writing: but, if A. had said "Let B. have goods on my account," or "let B. have goods, and charge me with them;" in these cases, no writing would be required, because B. never would be liable at all, the goods being supplied on A.'s credit and responsibility, though handed by his directions to B. You will find this proposition amply illustrated by Birkmyr v. Darnell, Salk. 27; Bird v. Gammon, 3 B. N. Ca. 889, 39 E. C. L. R.; Goodman v. Chase, 1 B. & A. 297, 20 E. C. L. R.; and the notes to Forth v. Stanton, 1 Wms. Saund. 211.

Goodman v. Chase presents rather a singular instance [*45] of the application of the rule of *construction of which I have been speaking. In that case,

quest of the executor, has been held a sufficient consideration, it being "a trouble and charge" to the creditor to do so. 1 Siderfin, 57. Any valid consideration suffices, (see the next lecture on "Considerations,") and such consideration flowing between the parties, according to the rule in p. 35, ante, must appear on the memorandum. See the notes in 2 Saund. 137 b, and 1 Saund. 209 a.

a debtor had been taken in execution, and Chase, in consideration that the creditor would discharge him out of custody, promised to pay his debt. It was held, that this promise need not be in writing; for that by discharging the debtor out of execution, the debt was gone; it being, as you are probably aware, a rule of law, that if a debtor be once taken in execution and discharged by his creditor's consent, that operates as a satisfaction of the debt;[1] and therefore that the debtor, having ceased to be liable, the promise to pay the amount was not a promise to pay any sum for which another person was responsible, and therefore did not require to be reduced to writing. (a)[2]

(a) The result is thus given at the end of an elaborate note, to which Mr. Smith presently refers, in Williams's Saunders:—The question, whether each particular case comes within the clause of the statute or not, depends not on the consideration for the promise, but on the fact of the original party *remaining liable*, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise. 1 Saund. 211 *e*, note *l*. See also Lane v. Burghart, 1 Q. B. 933, 41 E. C. L. R.; Bird v. Gammon, 3 B. N. C. 883, 32 E. C. L. R.; Bushell v. Beavan, 1 B. N. C. 103, 27 E. C. L. R.

The principle is not very evident on which the Courts have thus held that the liability of the original party must continue, *after the promise is made*, in order to bring it within the statute. In the first place the words of the statute do not require it; it provides merely that no action shall be brought "to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless," &c. Now these words are satisfied by a promise to answer for a debt existing when the promise was made. Nor

[1] Sharp v. Specknagle, 3 Serg. & Rawle, 463; Palethorpe v. Lesher, 2 Rawle, 274; Snevily v. Read, 9 Watts, 396; Lathrop v. Briggs, 8 Cowen, 171; Runsom v. Keyes, 9 Id. 128; and this, although he may have been discharged on terms not afterwards complied with; 1 Term. 558, 6 Id. 525; 7 Id. 420.

[2] Butcher v. Stewart, 11 Mees. & Welsby, 857, was very similar in its facts to Goodman v. Chase, and was decided upon its authority.

[*46–*47] * It was at one time thought that a verbal promise even to answer for the debts of another for *which that other remained liable, might be available if founded on an entirely new consideration conferring a distinct benefit upon the party making

is it less a promise to answer for that debt, nor does it cease to be one, because the debt may afterwards be no longer recoverable from the person who incurred it; and although the debt be extinguished, the default at any rate remains, and the case in question is precisely that of answering for a "default." But the action is brought upon the *promise*, and not upon the debt or the default; and if it were a debt at the time of the promise, it seems to be within the letter of the statute. It is also within its spirit; for a creditor would not be less likely to set up a fraudulent claim against a third person because he had lost his remedy against the original debtor; therefore, the prevention of fraud and perjury, which the statute was designed to effect, is as much needed in the one case as in the other. It is submitted that the fact that the liability is to be exclusively borne by the guarantor, is an additional reason for requiring written evidence that the promise was advisedly made. The courts, however, have held that it is essential to the operation of this clause, that the undertaking shall be not only collateral at the time it was made, but that it shall continue to be so; and that the original demand shall remain in full force. Lord Ellenborough, C. J., said, in the above-named case of Goodman v. Chase, "By the discharge of the original debtor with the plaintiff's consent, the debt as between those persons is *satisfied*[?] * * * * Then, if so, the promise by the defendant here is not a collateral but an original promise, for which the consideration is the discharge of the debt as between the plaintiff and Chase." And upon the distinction between absolute and collateral promises the subsequent decisions have turned. See Butcher v. Stewart, 11 M. & W. 857, per Parke B.; Green v. Cresswell, 10 Ad. & Ell. 453, 37 E. C. L. R., per Lord Denman, C. J.

Thus the law now is, that where the transaction leaves a continuing liability on the original debtor, as in the case of discontinuance of an action against him, as in Tomlinson v. Gell, then the promise must be in writing; but where it extinguishes or discharges the original debt, and transfers the liability, as in Goodman v. Chase, the promise to pay it to the guarantor need not be in writing, though the debt existed when the promise was made.

such promise. This idea is, however, confuted by Serj. Williams in an elaborate note to the case of Forth v. Stanton, which I have already cited; and the rule there laid down by him, and which has ever since been approved of, is, that the only test and criterion by which to determine whether the promise needs to be in writing is the question whether it is, or is not, a promise to answer for a debt, default, or miscarriage of another *for which that other continues liable.* If it be so, it must be reduced to writing, nor can the consideration in any case be of importance except in such cases as Goodwin v. Chase, in which the consideration to the person giving the promise is something which extinguishes the original debtor's liability.(*a*) You

(*a*) It is so stated in the middle of the note, but less broadly at the end of it, in the last edition; for the cases where the guarantor *has* an interest in his promise have given rise to some conflict of opinion, which Mr. Serj. Williams resolves as just cited (p. 45); where he couples with the continuing liability of the original party "the absence of any liability on the part of the defendant or his property, except such arises from his express promise;" *both* of which conditions he holds requisite to bring a guarantee within the statute. Thus, where there is a purchase of an interest by the guarantor, or where the creditor is induced by the promise of the guarantor to surrender a lien or other security for his debt, the relation of the parties is changed; Chit. 513; the undertaking assumes the character of an original contract between the guarantor and the creditor; and the case is no longer within the mischief of the statute. (See Williams v. Leper, 3 Burr. 1886, and Thomas v. Williams, 10 B. & Cr. 664, where the cases are reviewed by Ld. Tenterden, C. J.) So, where the goods sold are transferred by consent of the parties to the guarantor, for this is a new sale. (Browning v. Staltard, 5 Taunt. 450.) Wherever the guarantor is liable on other grounds than his guarantee, the promise need not be in writing. The liability on the original debt need not have arisen at the time of the promise, provided it arose afterwards, and that it remained; it may be a prospective liability constituting the consideration for the promise. The common case of becoming responsible for goods to be supplied to another on the faith

will see Serj. Williams's criterion approved of in Green v. Cresswell, 10 A. & E. 453, 37 E. C. L. R., and Tomlinson v. Gell, 6 A. & E. 564, 33 E. C. L. R.[1]

of that promise, is within the statute; likewise, a promise to bear harmless one who shall be bail for another. (See Green v. Creswell, 10 Ad. & Ell. 453, 37 E. C. L. R.) If the debtor be not liable, whether the debt be present or prospective, neither can the guarantor, as in the case of a contract by an infant not for necessaries. 1 Burr. 373.

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[1] To guard against the danger arising from the facility by which loose or ill-remembered words might be tortured into a contract on the part of him who used them, the common law wisely provided that a liability should not depend upon mere words unaccompanied by a consideration for their basis. And as the danger was felt to be the more strong where the words related not to an undertaking by a party for his own benefit, but on behalf of a third person, the fourth section of the Statute of Frauds superadded a writing to the common law requirement of a consideration. Whether such a provision has been conducive of more benefit than harm may well be doubted (see Holmes v. Knights, 10 N. H. 176), for the decisions to which it has given rise are as remarkable for their multitude as for the difficulty of their perfect classification.

The cases may naturally be divided into those where the promise of guarantee was *concurrent* with the principal contract, and those where it was *subsequent* to its creation.

1. Under the first of these classes, the *common law* is satisfied wherever the promise is made at the same time as the principal contract, and is an essential inducement to it. No other consideration is necessary than that moving between the creditor and the original debtor, Kirby v. Coles, Cro. Eliz. 137; and it matters not whether the promise be absolute, or conditional and dependent upon default of the other; (Leonard v. Vredenburg, 8 Johnson, 29; Snevily v. Johnson, 1 Watts & Serg. 307.)

The fourth section of the Statute of Frauds however altered the common law to this extent,—where the promise is conditional and dependent upon the default of the other, it must be in writing; where, however, it is not thus conditional and dependent, but is direct and absolute, the case rests as at common law, and the statute does not apply. But there is a class of cases which, proceeding upon the suggestion of Mr. Serjt. Williams, *suprâ*, seem to determine that however direct and absolute the contract of the defendant may be, it shall not be *deemed* to be a direct undertaking, so as to take the case out

*In the very late case of Eastwood v. Kenyon, 11 A. & E. 446, 39 E. C. L. R., the Court [*48]

of the statute, unless all liability is withdrawn from the other party, and thrown entirely upon the shoulders of the defendant; in other words, although there may be a joint contract, yet if the consideration move only to one, unless *all* the credit is given to the other, the engagement of that other is collateral and not direct—it is, therefore, within the statute, and he is not liable unless his promise and its consideration appear in writing; Rogers v. Kneeland, 13 Wendell, 114; Brady v. Sackrider, 1 Sandford, 515; Cahill v. Bigelow, 18 Pick. 369; Elder v. Warfield, 7 Harris & Johns. 397; Blake v. Parlin, 22 Maine, 395; Aldrich v. Jewell, 12 Vermont, 126; Smith v. Hyde, 19 Id. 56; Taylor v. Drake, 4 Strobhart, 437; Ware v. Stephenson, 10 Leigh, 167; Rhodes v. Leeds, 3 Stew. & Porter, 212; Faires v. Lodanc, 10 Alab. 50; Holmes v. Knights, 10 N. Hamp. 177; Proprietors v. Abbott, 14 N. Hamp. 159.

It has been said, that it may admit of question whether the application of this principle has not been carried too far in some cases, and whether what was in truth, as between the parties, the collateral liability, has not by means of it been transformed into a principal liability, and the real principal debtor thereby discharged through the operation of the statute; Holmes v. Knights, 10 N. H. 178; and practically it may often happen that a tradesman, thinking to increase his security by charging the goods to both parties, by that very means under the application of the rule sanctioned by the weight of authority, loses his remedy against one of them.

It has, moreover, been suggested upon great apparent soundness of principle (in Mr. Hare's note to Birkmyr v. Darnell, 2 Smith Lead. Cas. 311, 4th Am. ed.), that the question of the defendant's liability being direct or collateral, is not necessarily wholly dependent upon the withdrawal of all credit from, and the consequent non-liability of the party who receives the consideration; in other words, that there may be a direct liability, even where the other party is also liable. Thus, where two jointly purchase goods, the liability of one is no degree lightened by the fact of the other being also liable, nor, where the liability is thus co-extensive, is it changed in any way by the goods being intended for one rather than for the other,—each being still directly liable, the contract cannot be said to be "to answer for the default of another," and the case would seem to be unaffected by the statute.

Thus, in Wainwright v. Straw, 15 Vermont, 215, it was held that

of Queen's Bench decided a completely new point on the construction of this branch of the fourth section.

where a stove was sold to two for the use of one, each was liable, and no writing was necessary. And where the promises are several instead of joint, yet if each has bound himself directly and absolutely, the mere fact that the consideration moves to one only, ought not, it would seem, to turn into a mere collateral, that which was in fact an original contract. "It would scarcely seem," as was said by Story, J., in D'Wolf v. Rabaud, 1 Peters, 500, "a case of a mere collateral undertaking, but rather, if one might use the phrase, a trilateral contract. Each is a direct, original promise, founded upon the same consideration." Townsley v. Sumral, 2 Peters, 182; Proprietors v. Abbott, 14 N. Hamp. 157. Such a view is not, however, recognised by the class of cases first referred to, and in Taylor v. Drake, 4 Strobhart, 437, it was said that to make the delivery of goods to the one serve also as a consideration for the promise of the other, would be to strike down the statutory shield at a blow.

2. Where the promise is given *subsequently* to the creation of the debt, it is evident that the mere existence of that debt cannot, even at common law, be a sufficient consideration for the promise. (See infra, notes to page 112.) Another consideration must exist to support the promise, and this may be one of two kinds—it may either grow out of the debt itself, being connected therewith, such as the forbearance to sue the original debtor, or it may be a new and independent consideration. In the first case, although the promise could be supported at common law, it is within the statute, and a writing is necessary; in the second the statute does not apply; Leonard v. Vredenburgh, 8 Johnson, 29.

Thus, it is well settled, that a forbearance to sue the original debtor, or the discontinuance of a suit already brought, being considerations connected with, and growing out of the original contract, are, though entirely sufficient at common law, nevertheless, within the Statute of Frauds; Fish v. Hutchinson, 2 Wilson, 94; Bennett v. Pratt, 4 Denio, 275; Durham v. Arledge, 1 Strobhart, 5; Nelson v. Boynton, 3 Metcalf, 396; Stone v. Symmes, 18 Pick. 467. So, when the consideration consists in *the performance* of the preceding contract, as where a plaintiff having been employed by a contractor to build certain walls for the defendant, refused to go on unless the defendant would promise to pay him, which he did, it was held that the contract was within the statute, for the consideration related

They held that the *promise*, which is to be re- [*49]
duced *to writing, is a promise made to the
person to whom the original debtor is liable, but that

merely to the performance of the antecedent contract; Puckett v. Bates, 4 Alabama, 390.

But where there is some new and original consideration of benefit or harm moving between the new contracting parties, it is well settled that the case is not within the statute; Leonard v. Vredenburgh, supra; as where a promise to pay an existing debt is made in consideration of property placed by the defendant in the hands of the party thus promising; Hilton v. Dinsmore, 21 Maine, 410; Todd v. Tobey, 29 Maine, 219; Olmstead v. Greenly, 18 Johns. 12; Elwood v. Monk, 5 Wendell, 235; Hindman v. Langford, 3 Strobhart, 207; Lee v. Fontaine, 10 Alab. 755; Hall v. Rogers, 7 Humph. 536; or where the party to whom the promise is made relinquishes a levy on the goods of the debtor; Williams v. Leper, 3 Burrow, 1886; Castling v. Aubert, 2 East, 325; Marcein v. Mack, 10 Wendell, 461; Farley v. Cleveland, 4 Cowen, 432; Tindal v. Touchberry, 3 Strobhart, 177; Dunlap v. Thorne, 1 Richardson, 213; (though two late cases in New York, and one in Massachusetts, Barker v. Bucklin, 2 Denio, 45; Kingsley v. Balcombe, 4 Barb. S. C. 131; and Nelson v. Boynton, 3 Metcalf, 396, seem to hold, in opposition to the prior authorities in the former State, that the consideration must always consist in an advantage to the debtor or the promisor, and that a detriment to the promisee will not take the case out of the statute.)

It has been held in England, and in several of our States, that a promise to indemnify the guarantor against any loss in consequence of his undertaking, is not within the statute; on the ground that the promise is not that another shall perform that which he has undertaken, but that the promisee shall not lose by the engagement into which he has entered; Thomas v. Cook, 8 Barn. & Cress. 728; Chapin v. Merrill, 4 Wendell, 657; Chapin v. Lapham, 20 Pick. 467; Peck v. Thompson, 15 Vermont, 637; Holmes v. Knight, 10 New Hampshire, 175; Lucas v. Chamberlain, 8 B. Monroe, 276; Doane v. Newman, 10 Missouri, 69; Jones v. Shorter, 1 Kelly (Georg.), 294; but the more recent cases in England and in New York have not acknowledged this reasoning as satisfactory, "for every promise to become answerable for the debt or default of another may be shaped as an indemnity;" Green v. Cresswell, 10 Adolph. & Ellis, 453, 37 E. C. L. R.; Staats v. Howland, 4 Denio, 559; Kingsley v.

a promise made to the debtor himself, or even a third person, to answer to the creditor, would not require to be reduced to writing.(*a*)

In determining, however, whether a guarantee has been sufficiently reduced to writing to satisfy the fourth section, the question which most frequently arises is, whether the consideration do or do not sufficiently appear upon the written instrument. That in all cases within the fourth section, the consideration for the promise as well as the promise itself must appear in the written memorandum, has been already explained in the last lecture. It is not, however, absolutely necessary that it should be set down in express terms. It may be collected *by inference* from the entire wording of the written instrument; but then the inference relied on for this purpose must be a probable one, not a mere random guess. (See Bentham v. Cooper, 5 M. & W. 128; Jarvis v. Wilkins, 7 M. & W. 410; James v. Williams, 5 B. & Ad. 1109, 27 E. C. L. R.; Hawes v. Armstrong, 1 Bing. N. C. 761, 27 E. C. L. R.) To use the expressions of the L. C. J. Tindal in that case:

(*a*) The statute applies only to promises made to persons to whom another is already or is to become answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person towards the *promisee*. Hargreaves v. Parsons, 13 M. & W. 561. [And to the same effect was Johnson v. Gilbert, 4 Hill, 178.]

Balcombe, 4 Barbour S. C. 131, and the same view was taken in Draughan v. Bunting, 9 Iredell, 10.

The fourth section of the Statute of Frauds has not been re-enacted in Pennsylvania, and the law of that State is therefore unembarrassed by the distinctions to which it has given rise, nor is it believed that its absence has, to any great extent, occasioned the mischief which it was the object of the statute to prevent. The student may further profitably direct his attention on this subject, to the note to Birkmyr v. Darnell, in 1 Smith's Lead. Cases, 322, already referred to.

*"It is not necessary that the consideration should appear in *express terms*. It would be undoubtedly sufficient, in any case, if the memorandum is so framed that any person of ordinary capacity must infer, from the perusal of it, that such, and no other, was the consideration upon which the undertaking was given. Not that a mere *conjecture*, however plausible, would be sufficient to satisfy the statute, but there must be a well-grounded inference to be necessarily collected from the terms of the memorandum." [*50]

It may be useful, in order to impress upon the mind this doctrine, which is of very frequent practical application, to give one or two examples of decided cases in which the consideration for a guarantee has been held to appear sufficiently *by inference* from the other portions of the memorandum, although not stated in express terms.

In Newbury v. Armstrong, 6 Bing. 201, 19 E. C. L. R., the memorandum in writing relied on for the purpose of satisfying the exigency of the fourth section of the Statute of Frauds, was as follows:

To Mr. John Newbury.

Sir:—I, the undersigned, do hereby agree to bind myself to you, to be security for S. Corcoran, late in the employ of J. Pearson, of London Wall, for whatever you may intrust him with while in your employ, to the amount of 50*l.*, in case of any default to make the same good.

(Signed) W. Armstrong.

Here, you see, is not a word *expressly* said about the consideration for Armstrong's becoming security, and it was objected, upon that ground, that the writing in question was not a sufficient *memorandum to satisfy the statute. The Court of Common Pleas, however, held that it was but a fair inference from the terms of the instrument, that the consideration was to be the employment of Corcoran in the service of Newbury. "The words," said the Lord Chief Justice, "are all *prospective:* it may fairly be [*51]

implied that Corcoran had left one service, and that the guarantee was given in consideration of his being taken into another." Similar to this, in principle, was the case of Stapp v. Lill, 1 Camp. 243, 9 East, 348, where the memorandum relied on was worded thus:

"I guarantee the payment of any goods which Mr. John Stapp shall deliver to Mr. Nicholls of Brick Lane."

JOHN LILL.

It was decided by Lord Ellenborough first, and afterwards by the whole Court of Queen's Bench, that this instrument was sufficient; for that it might fairly be collected from its terms that Lill intended the consideration for his own liability to be the delivery of goods by Stapp to Nicholls.[1]

On the other hand, in the well-known case of Saunders v. Wakefield, 4 B. & A. 596, 24 E. C. L. R., the guarantee was as follows:

"Mr. Wakefield will engage to pay the bill drawn on Pitman in favour of Stephen Saunders."

This was held insufficient, for it appeared from the memorandum that the bill was already *drawn, [*52] and it did not appear that Wakefield had anything to do with the drawing, or had requested Saunders to advance anything upon it, and, consequently, it did not appear that there was any consideration for his promise to pay it.

[1] The very recent case of Bainbridge v. Wade, 1 Eng. Law & Eq. R. 236, was very similar. The words of the instrument were:

"I hereby guarantee the payment of any sums of money due to you from Mr. Andrew Little, the amount not to exceed, at any time, the sum of £100. JOSEPH WADE"

and the Queen's Bench held that the consideration evidently appeared to be a future dealing between the parties, as the words, "not to exceed, at any time, £100," could not refer to the past.

In all these cases you must recollect that, if verbal evidence had been allowed, it would probably have appeared clear enough that there was a good consideration for the promise sued on; but, as it is indispensably necessary that the consideration should appear, not from such evidence, but from the instrument itself, it became necessary in every case to look narrowly at the words, with a view of ascertaining, as in the instance I have just put, whether, though it do not appear in terms, it may not be collected by inference.[1] I think I have sufficiently explained the nature of these inquiries; but if you think fit to pursue the subject, you may refer to Raikes v. Todd, 8 Ad. & Ell. 846, 35 E. C. L. R.; Bentham v. Cooper, 5 M. & W. 628; Jarvis v. Wilkins, 7 M. & W. 410; Brooks v. Haigh, 10 Ad. & Ell. 323, 37 E. C. L. R.; and Kennaway v. Treleavan, 5 M. & W. 498; which are the last decisions on this branch of the law.(*a*)

(*a*) In Kennaway v. Treleavan the guarantee was thus worded: "Gentlemen, I hereby guarantee to you the sum of 250*l.*, in case Mr. P. should default in his capacity of agent and traveller to you." It was held that the future employment of Mr. P. was the consideration of this promise, and that it sufficiently appeared by inference from the terms of the guarantee. But the case of Haigh v. Brooks, 10 Ad. & Ell. 309, 37 E. C. L. R., is the strongest on this point, and has carried the latitude of inference to its extreme length: it was cited in the recent case of Chapman v. Sutton, 15 Law Jour. C. P. 166; and the guarantee was thus worded: "In consideration of your *being in advance* to Messrs. John Lees & Co. in the sum of 10,000*l.*, for the purchase of cotton, I do hereby give you my guarantee for that amount (say 10,000*l.*) on their behalf;" and it was held, that whether the consideration, "your *being in advance*," was or was not a good consideration, depended upon the transaction to which the guarantee referred. Lord Denman, C. J., remarks: "Being in advance does not necessarily mean that the plaintiff was in advance at the time of the giving of the guarantee. It may have been intended

[1] See note to next page.

[*53–*54] *There is one thing which, though collateral to the Law of Contracts, relates so peculiarly to *this branch of the Statute of Frauds, that

as prospective." The judgment in the Exchequer Chamber was given upon this ground; and Lord Abinger, C. B., said that "there was in the guarantee an ambiguity that might be explained by evidence, so as to make it a valid contract."[1]

Raikes v. Todd, above cited, is a good illustration of an insufficient disclosure of consideration. The guarantee was thus expressed: "Gentlemen, I hereby undertake to secure to you the payment of any sums of money you *have* advanced, or *may hereafter* advance, to Messrs. Davenport & Co., on their account with you, commencing on the 1st November, 1831, not exceeding 2,000*l*." Here it was held that the guarantee disclosed no consideration for the *past* advances, and was to that extent invalid, but that it was good as regarded the future advances.[2] Thus, if the guarantee consist of several promises, that which is bad may be rejected without invalidating the remainder of the guarantee.[3] There is no practical difference between past and

[1] The recent cases have affirmed Haigh v. Brooks, and while reiterating the rule which forbids the introduction of parol testimony to explain such instruments, have, at the same time, decided that evidence is admissible to show the circumstances of the parties at the time of making the guarantee; Bainbridge v. Wade, 1 Eng. Law and Eq. R. 236; Colbourn v. Dawson, 4 Id. 378; Edwards v. Jervis, 8 Com. Bench, 436, 65 E. C. L. R.; Butcher v. Stewart, 11 Mees. & Wels. 837. Thus in Goldshede v. Swan, 1 Excheq. 154, the words were, "In consideration of your having thus advanced to our client, Mr. Dolphin, £750, we promise," &c., and it being objected that the guarantee was bad, as referring to a *past* consideration, parol evidence was held to have been properly admitted to show that the instrument was sigued simultaneously with a check given to Dolphin.

[2] Similar to this was Wood v. Benson, 2 Cromp. & Jervis, 94, where the guarantee was: "I engage to pay for all the gas which may be consumed in the M. Theatre, during its occupation by A. B.; and I also engage to pay for all arrears which may now be due;" and the Court held that, as regarded the *future* supply, the statute did not apply; as to the past, the contract was void, as without consideration.

[3] It is, of course, otherwise where the contract is an entire one, and incapable of apportionment, or if it is declared on as an entire pro-

I think it ought to be mentioned. After the fourth *section of the Statute of Frauds had rendered verbal guarantees unavailable, it became the [*55]

future considerations, so long as the guarantee discloses a sufficient consideration in law to support the promise (of which see the next lecture). The consideration need not be co-extensive with the promise. (See Raikes v. Todd, per Ld. Denman, C. J.) And the Courts will no longer enter into the question of adequacy of the consideration. See Chapman v. Sutton (supra), which is the last case where the question of the sufficiency of the inference of a consideration has arisen. See, also, Lang v. Neville, 6 Jurist, 217, and Johnson v. Nicholls, 1 C. B. 251, 50 E. C. L. R.

It is permissible to adduce, in evidence of the consideration, the written correspondence between the parties, if that correspondence has been referred to in the guarantee, but not otherwise. See Dobell v. Hutchinson, 3 Ad. & Ell. 355, 30 E. C. L. R., and Higgins v. Dixon, 14 Law Jour. Q. B. 329.

The rules which govern the construction of contracts, and which will be afterwards considered, of course apply to guarantees. But there is one peculiarity attaching to them, which it may be well to notice here. Guarantees are either for definite or indefinite sums or periods: where they are not limited as to the amount guaranteed, or, being so limited, are in either case intended to affect future transactions until revoked, they are termed continuing guarantees. The distinction between these two classes of guarantee is one of some nicety, and often of importance, as regards the sufficiency of the consideration, which again frequently depends upon whether it be past or prospective.

The only safe rule of construction is to give the words used their natural meaning, taking into account the attendant circumstances which are admissible in evidence to throw light upon the intent of the parties to the instrument. This rule has been recently applied in the case of Allnutt v. Ashendon, 5 M. & Gr. 392, 44 E. C. L. R., where the guarantee was thus worded: "I hereby guarantee Mr.

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mise; in which case, if any part of the contract be vitiated by the statute, there is a variance—a failure of proving the contract as laid; Lexington v. Clark, 2 Ventries, 223; Chate v. Beckett, 7 Term, 201; Thomas v. Williams, 10 Barn. & Cress. 664, 21 E. C. L. R.; Crawford v. Morrell, 8 Johnson, 253; Holloway v. Hampton, 4 B. Monroe, 415.

[*56] *fashion in such cases to bring actions upon the case for *false representations*, under circumstances

John Jennings's account with you for wine and spirits, to the amount of 100*l*." This was held to apply to an existing account; for, said Tindal, C. J., "by account I understand the parties to mean some account contained in some ledger or book; and the case shows that there was such an account existing at that time. The natural construction of the guarantee therefore is, that it relates to that account." In the subsequent case of Hitchcock v. Humfrey, 5 M. & Gr. 559, 44 E. C. L. R., the defendant, having guaranteed the payment of goods to be supplied by the plaintiffs to A., up to the first of July, gave, on the 9th of April, the following additional guarantee: "In consideration of your extending the credit already given to A., and agreeing to draw upon him at three months from the first of the following month, for all goods purchased up to the 20th of the preceding month, I hereby guarantee the payment of any sum that shall be due and owing to you upon his account for goods supplied." This was held to be a continuing guarantee: the words "following month" and "preceding month" being held to have a general application, the terms of the first guarantee being taken into account in construing the language of the second.[1] For other cases of the con-

[1] So a guarantee, "If D. wishes to take goods of you, we are willing to lend our names as security for any amount he may wish," was held not to extend beyond the first delivery of goods; Rogers v. Warner, 8 Johnson, 119. The same construction was given in Aldrich v. Higgins, 16 Serg. & Rawle, 212, where the words were: "L. C. having a desire to enter into trade in a small way, we hereby offer ourselves as security to any gentleman who may feel disposed to give him credit not exceeding $700, or anything less, as he may think proper to contract;" in White v. Reed, 15 Connect. 457: "In any sum my son G. may become indebted to you, not exceeding $200, I will hold myself accountable;" in Anderson v. Blakely, 2 Watts & Serg. 237: "Mr. P. having informed me that he is making some purchases from you, and that you wish some reference, I would say that you might credit him with perfect safety, and that anything he might purchase from you I will see paid for," where the Court said: "There is more reason, perhaps, for giving a freer interpretation where the sum is, as in several of the cases, limited, because there the party intrenches himself within a certain amount, beyond which he can, in no case, be made liable. But when there is no restriction

in which, before the Act, the transaction would have been looked on as one of guarantee. For instance, if

struction put on these instruments, see Mayer v. Isaac, 6 M. & W. 605; Jenkins v. Reynolds, 3 B. & B. 14, 7 E. C. L. R.; Allan v.

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of the amount, the guarantee should be carefully scanned, to see whether it justifies a party in the large construction contended for." And the same view was taken in Whitney v. Groot, 24 Wendell, 82, upon the words: "We consider I. V. good for all he may want of you, and we will sell him all he reasonably asks of us on credit, and we will indemnify the same." On the other hand, in Grant v. Risdal, 2 Harris & Johns. 186, "I will guarantee their engagements, should you think it necessary, for any transaction they may have with your house," was held to be a continuing guarantee till countermanded, but the reasons for the judgment are not reported. Instances of continuing guarantees will be found in Clark v. Burdett, 2 Hall, 197; Mussey v. Rayner, 22 Pick. 223; Bent v. Hartshorne, 1 Metcalf, 24; Douglass v. Reynolds, 7 Peters, 113; Lawrence v. M'Calmont, 2 Howard (U. S.) 426. As, for example, "Mr. R. is about to establish a store of books and stationery. He will commence on a limited scale, with the intention of enlarging the business next spring. He wishes to purchase school-books, &c., on a credit of four or six months, and paper, &c., on commission. For the faithful management of the business, and punctual fulfilment of contracts relating to it, the subscriber will hold himself responsible;" Mussy v. Rayner.

While it is undoubtedly true that each case must depend on the particular terms of the guarantee, aided by the attendant circumstances of the parties, it has been often suggested, if not held, that the language should be very strong to justify a court in holding a guarantee to be a continuing one, until notice given to the contrary; per Story, J., in Cremer v. Higginson, 1 Mason, 336; Nicholson v. Paget, 1 Crompt. & Meeson, 48; while, on the other hand, it has been more repeatedly held that the ordinary maxim, that the words of the instrument should be taken most strongly against the party using them, fully applied to guarantees; Mason v. Pritchard, 12 East, 227; Merle v. Wells, 2 Campbell, 413; Drummond v. Preestman, 12 Wheaton, 515; Douglass v. Reynolds, supra; Mayer v. Isaac, 6 Mees. & Welsby, 610, where the remarks in Nicholson v. Paget, supra, are disapproved.

A. went to a tradesman to persuade him to supply goods to B., by assuring him that he should be paid

Kenning, 9 Bing. 618, 23 E. C. L. R.; Batson v. Spearman, 9 A. & Ell. 298, 36 E. C. L. R.; Hargreave v. Smee, 6 Bing. 244, 19 E. C.

There is an important class of cases upon the subject of notice to the guarantor, the doctrine of which may be said to be almost peculiarly American. It is a rule of the common law, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he may make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies in the peculiar knowledge of the opposite party, then notice ought to be given him; Vyze v. Wakefield, 6 Mees. & Welsby, 452. But in the cases of Russell v. Clark, 7 Cranch, 69, and Edmondson v. Drake, 5 Peters, 624, this principle was, in its application to mercantile guarantees, thought rather an obligation of commercial than of the common law, and in the subsequent case of Douglass v. Reynolds, 7 Peters, 113, which is a leading case upon the subject, this view was directly sanctioned, and it was held that notice of the acceptance of a guarantee, and of the giving credit under it, must be given to the guarantor immediately or within reasonable time, (unless, indeed, in the case of a continuing guarantee, when it would not be necessary to give notice of each successive transaction as it arose, but after the transactions were closed, notice of the whole amount for which the guarantor was held responsible should be given to him within a reasonable time); and further, that demand of performance must be made upon the principal, and immediate notice of his default given to the guarantor, and that a failure so to do would discharge the latter, unless it be clearly made out that under the circumstances of the case no injury had resulted to him from the neglect. This rule has been frequently affirmed by the Supreme Court of the United States, and adopted in most of the States, and the student will find the authorities collected and their distinctions classified in the first volume of American Leading Cases, p. 50, note to Douglass v. Reynolds. Some of the authorities where the subject is most elaborately discussed, are Craft v. Isham, 13 Connecticut, 28; Wildes v. Savage, 1 Story, 22; Howe v. Nickels, 22 Maine, 175. In many of the cases notice would have been necessary under the common law rule referred to, but the authorities have based them upon the principles of commercial law.

In New York, however, dissent from this doctrine of notice has

for them, the tradesman, in case of B.'s default, could not, it is true, bring an action of *assumpsit* as upon a

L. R.; Nicholson v. Paget, 1 C. & M. 48; Martin v. Wright, 14 Law Jour. Q. B. 142 [since reported, 6 Queen's Bench, 917, 51 E. C. L. R.]; and Johnston v. Nicholls, supra.

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been expressed in Douglass v. Howland, 24 Wendell, 35; Whitney v. Groot, Id. 82; Smith v. Dann, 6 Hill, 543; Curtis v. Brown, 2 Barbour's S. C. R. 51; Union Bank v. Coster, 3 Comstock, 203. In the first of these cases the defendant's agreement was such (viz., that one B. should faithfully perform an agreement with the plaintiff to account and pay over all such sums as should be found due from him to the latter), as would not have required notice under any circumstances, as the events to which it referred, though prospective, were not dependent on the option of the plaintiff; but the Court held that as a general rule, when nothing on the face of the guarantee required notice, the Court could not exact one as a condition precedent to a recovery. In the opinion of the annotator referred to, the weight of reasoning lies between these two classes of cases, and points to the following rule: that in all cases in which the contract of the guarantor does not determine precisely the nature and the amount of liability for which he is willing to make himself responsible, and leaves either or both these points to the choice of the person who seeks to enforce the guarantee, the latter is bound to give notice of the mode in which he has exercised the election thus accorded him, and cannot complain that there has been a default on the part of the defendant before giving him precise information as to what is necessary to be done in order to fulfil his engagements; but that when the defendant's contract, instead of leaving open the cause of action upon which he is willing to make himself liable, points out some mode of performance, in consideration of which he is willing to be bound, either directly or on behalf of another person, an action will lie without notice as soon as the consideration has been performed.

Notwithstanding a few decisions or dicta to the contrary (2 M'Lean, 21, Id. 369, Id. 557), the weight of authority has unquestionably settled, that however necessary notice may be to a recovery, it need not be averred in the declaration; Gibbs v. Cannon, 9 Serg. & Rawle, 198; Rhett v. Poe, 2 Howard, 485; Salisbury v. Hale, 12 Pickering, 424; Dole v. Young, 24 Id. 250; Wildes v. Savage, 1 Story, 22; inasmuch as the want of notice will only operate as a defence to the guarantor where it has resulted in some actual injury to him, and is

warranty, because there was no written memorandum of what passed; but he brought an action on the case, in which he accused A. of having knowingly deceived him as to B.'s ability to pay: and if the jury thought this case made out (as a jury composed of tradesmen were very apt to do), he succeeded in his action, and received pretty nearly the same sum as he would have done if there had been a guarantee. However, as this

The cases turn, as remarked by the Lord Chief Justice in that of Martin v. Wright, on the particular terms of each guarantee, and it is therefore impossible to lay down any less general rule of construction than that which we have endeavoured to give.

Promises to answers for tortious defaults are within the operation of the statute, as well as guarantees of credit. Kirkham v. Marter, 2 B. & Ald. 613, is a leading authority on this point. A. having killed B.'s horse, C. guarantees to B., the owner, to answer for the damage: this was held to be within the statute. Lord C. J. Abbott distinguished this case from that of Read v. Nash, 1 Wils. 305, but which Serjeant Williams thinks it overrules. 1 Saund. 211 c., n. 1.

Shares in a joint stock company are mere choses in action; but railway shares, it is submitted, inasmuch as they give an interest in land, would fall under the operation of the 4th section.

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different in its operation in this respect from the notice required to charge an endorser of a negotiable instrument, in which case the rule is inflexible and open to no inquiry whether notice could have availed him or not, as in either case the endorser is absolutely discharged.

Before leaving the subject of guarantees, it may be remarked that in Pennsylvania, a peculiar signification has been given to the word *guarantee*, as distinguished from other words of similar import, such as "agree to become answerable," or the like, and a guarantee of a debt due by another (which it will be remembered, owing to the absence of the fourth section of the Statute of Frauds in that State, need not be in writing), merely imports an undertaking that the debt is susceptible of collection, and the guarantor is not liable until the insolvency of the principal is shown. Such a course of decision, though it has been sometimes regretted, is firmly established by a class of cases; Chapman v. Johnson, 3 Penn. Rep. 18; Isett v. Hoge, 2 Watts, 128; Snively v. Ekel, 1 Watts & Serg. 204; Parker v. Culbertson, 1 Wallace, jr., 161.

was a palpable evasion of the Statute of Frauds, the Legislature put an end to it by enacting, in statute 9 Geo. 4, c. 14, commonly called Lord Tenterden's Act, "that no action shall be brought to charge any person by reason of any representation or assurance made or given concerning or relating to *the character, conduct, credit, ability, trade, or dealings of any [*57] other person, to the intent or purpose that such other person may obtain credit, money, or goods upon [*sic*], unless such representation or assurance be made in writing, signed by the party to be charged therewith."

The effect of this section was much discussed in the great case of Lyde v. Barnard, 1 M. & W. 99, the judgments in which deserve a very attentive perusal.(*a*)[1]

The third of the species of contracts enumerated by the fourth section, and required by it to be evidenced in writing, is: *Any agreement made in consideration of marriage.*

It certainly would strike any one (except, perhaps, a lawyer) that a promise by a woman to marry a man in consideration of his promising to marry her, was an agreement made in consideration of marriage. And, indeed, in Philpot v. Wallet, it was expressly so de-

(*a*) The absence of a written memorandum under this statute may be given in evidence under the general issue, and must not be specially pleaded. Turnley v. Macgregor, 6 Scott, N. R. 906.

Representations made by one partner of a firm with respect to its credit are within the statute (Devaux v. Steinkeller, 6 B. N. C. 84, 37 E. C. L. R.); and statements as to the circumstances of the party to whom credit is given are within the 9 Geo. 4, c. 14, if made so as to convey the belief that he may be trusted. Swan v. Phillips, 8 Ad. & Ell. 457, 35 E. C. L. R.

[1] See the remarks upon this act in Ewins v. Calhoun, 7 Vermont, 83. A similar statute exists in Massachusetts. Rev. St., c. 74, § 3.

cided. That case is reported in 3 Levinz, 65: it was an action of assumpsit for breach of promise of marriage. The jury found the promise, and found, also, that *it had not been reduced to writing. And it [*58] was objected, "that this was no promise within the Statute of Frauds and Perjuries, for that must be intended of promises to pay money upon marriages, and not of promises to marry." But the report proceeds to say that to this it was answered and resolved, that this promise is directly within the words of the statute, and not out of the intent, because the promise is, that in consideration the one would marry the other, the other would marry him. However, as Lord Coke has observed, the reason of the law is not always like a man's natural reason; and, accordingly, the case of Philpot v. Wallet has been overruled by Cork v. Baker, 1 Str. 34; and it has been decided by that case, and Harrison v. Cage, 1 Ld. Raym. 386,[1] that an agreement between two persons to marry is not an agreement in consideration of marriage, but that these terms are confined to promises to do something in consideration of marriage other than the performance of the contract of marriage itself; a decision which shows how very cautious a man ought to be in pronouncing an opinion upon the construction of any statute.

We now come to the fourth class of promises enumerated by the fourth section, viz.: *Any contract for the sale of lands, tenements, hereditaments, or any interest in or concerning them.*

These words, you will observe, are exceed- [*59] ingly *large,(a) comprehending not merely an

(a) The words of the clause are as follow: that "no action shall

[1] The doctrine of these cases was affirmed in Ogden v. Ogden, 1 Bland, 287, and Clark v. Pendleton, 20 Connect. 508.

interest IN land itself, but an interest *concerning* it. And the main questions which have arisen have accordingly been, Whether particular contracts falling very near the line, do or do not *concern land*, so as to fall within these terms. Thus it was held, in Crosby v. Wadsworth, 6 East, 602, that an agreement conferring an exclusive right to the vesture of land during a limited time and for given purposes, is a contract or sale of an interest in, or at least *concerning* lands; and for the non-performance of which, if made by parol, an action cannot be maintained. So, in the Earl of Falmouth v. Thomas, 1 Cr. & Mee. 110, where an incoming tenant agreed to take the crops from the outgoing tenant at a valuation, this was held to be an agreement relating to land. In Tyler v. Bennett, 5 Ad. & Ell. 377, 31 E. C. L. R., an agreement that the plaintiff should be allowed to take water from a particular well was held to concern land, and to require a writing.[1] On the other hand, in Evans v. Roberts, 5 B. & C. 829, 11 E. C. L. R., where the plaintiff had sold to the defendant a growing crop of potatoes, this was decided not to be a *sale of any *interest in or concerning land.* It was contended that, as the potatoes were deriving nourishment and support from the soil, and would have passed as part of the land by a conveyance of it, an interest in them must, at all events, be [*60]

be brought whereby to charge any person upon any *contract or sale* of lands, tenements, or hereditaments, or any *interest in* or concerning them; unless the agreement upon which such action shall be brought, or some *memorandum* or note thereof, shall be in *writing*, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

[1] So of a right of permanently overflowing the land of another; Harris v. Miller, 1 Meigs, 156, or erecting a permanent mill-dam; Stevens v. Stevens, 11 Metcalf, 251; Thompson v. Gregory, 4 Johns. 81.

taken to *concern* land; and great reliance was placed on the decision in Crosby v. Wadsworth, 6 East, 602, which I have already cited; and where a growing crop of grass was sold, and was to be mowed by the vendee, the sale was held to fall within the statute, and require a writing. However, the Court held that that case was distinguishable.

"Although," said Mr. Justice Holroyd, "the vendor might have an incidental right by virtue of his contract to some benefit from the land while the potatoes were arriving at maturity, yet I think he had not an interest in land within the meaning of this statute; he clearly had no interest so as to entitle him to the possession for any period, however limited, for he was not to raise the potatoes. Besides, this was not a contract for the sale of the produce of any specific part of the land, but of the produce of a cover of land. The plaintiff did not acquire by the contract any interest in any specific portion of the land; the contract only binds the vendor to sell and deliver the potatoes at a future time at the request of the buyer, and he was to take them away."

With regard to this case, it is worth while to observe, that though, according to the decision of the Court, the contract did not fall within the fourth section, as the sale of an interest in or concerning lands, yet it would clearly fall within the seventeenth, to which, before the conclusion *of the course, I shall have occa- [*61] sion to advert, as being a sale of goods and chattels: but no point arose upon that section, because one shilling had been paid as *earnest money*, which is one of the modes of satisfying the provisions of the seventeenth section.

I think the examples I have given are sufficient to explain to you the general nature of the points which arise on this part of the section. If you desire to pursue the subject, you may refer to Warwick v. Bruce, 2 M. & S. 205; Jones v. Flint, 10 Ad. & Ell. 753, 37 E.

C. L. R.; and Sainsbury v. Matthews, 4 M. & W. 343.(a)[1]

(a) The result of the cases above cited is stated in the last edition of Williams's Saunders, in an elaborate note to the case of Duppa v. Mayo, 277 c. n. f., and is to the effect that no contract is within the statute which does not "give the buyer an interest in the land;" that a mere easement of the right to enter the land for the purpose of harvesting and carrying away emblements or *fructus industriales* (i. e. the product of labour and industry, such as corn, potatoes, &c., not being the spontaneous growth of the soil), whether they have arrived at maturity or not, is not an interest in land; and that a contract for the sale of such produce, being a mere sale of goods, need not be in writing. The decision in Crosby v. Wadsworth, respecting a vesture of the land, and Evans v. Roberts, and Parker v. Staniland, 11 East, 363, as to potatoes, are in accordance with this rule, which is confirmed by the Court of Queen's Bench, in the case of Jones v. Flint, where the agreement was for the sale of a crop of growing corn and potatoes, and the eatage of grass; and where the ground of decision is expressly stated to be "the legal character of the principal subject-matter of sale, and the consideration *whether, in order to effectuate the intentions of the parties, it be necessary to give the vendee an interest in the land.* Tried by these tests we think that if the lay

[1] In Evans v. Roberts (which was approved in Dunne v. Ferguson, 1 Hayes' (Irish) Rep. 542, where is an able opinion by Joy, Ch. Baron), the case of Emerson v. Heelis, 2 Taunton, 38, was virtually overruled, and Waddington v. Bristow, 2 Bos. & Pul. 452, endeavoured to be explained. Those cases decided that a sale of growing turnips and hops was within the fourth section of the statute. In Rodwell v. Phillips, cited supra, Lord Abinger suggested that the difference appeared to be between annual productions raised by the labour of man, and the annual productions of nature, not referable to the industry of man, except at the period when they were first planted; which, together with the disapprobation expressed of Waddington v. Bristow, supra, would seem to determine that an annual crop is not within the fourth section of the statute: and it seems to be generally held, on this side of the Atlantic, that such a crop is personal property, and, as such, can be sold by the owner or taken in execution; Newcomb v. Rayner, 2 Johnson, 430; Whipple v. Foot, Id. 418; Stewart v. Doughty, 9 Id. 212; Austin v. Sawyer, 9 Cowen, 39; Stambaugh v. Yeates, 2 Rawle, 161; Myers v. White, 1 Id. 356;

[*62] *In all these cases, however, the observation applies which I have made in the former lec-

grass be excluded, the parties must be taken to have been dealing about goods and chattels."

When Mr. Smith's lecture was written this was the latest decision on the subject. But it is impossible to reconcile the rule thus laid down with the still later decision of the Court of Exchequer in the case of Rodwell v. Phillips, 9 M. & W. 501, which was on an agreement for the sale of growing fruit and vegetables, in which the same question arose under the Stamp Act, 55 Geo. 3, c. 184. The judgment, after *Curia adv. vult*, contains this passage:—

"There is a great variety of cases, in which a distinction is made between the sale of growing crops and the sale of an interest in land; and it must be admitted, taking the cases altogether, that no general rule is laid down in any one of them that is not contradicted by some other. It is sufficient, however, for us to say, that we think this case ought not to be governed by any of those in which it is decided that a sale of growing crops is a sale of goods and chattels. Growing fruit would not pass to an executor, but to the heir; it could not be taken by a tenant for life, or levied in execution under a writ of *fi. fa.* by the sheriff; therefore it is distinct from all those cases where the interest would pass, not to the heir at law, but to some other person.

Bank of Pennsylvania v. Wise, 3 Watts, 406; Penhallon v. Dwight, 7 Mass. 34; Cutter v. Pope, 13 Maine, 377; Craddock v. Riddlesberger, 2 Dana, 205; Brittain v. M'Kay, 1 Iredell, 265; Green v. Armstrong, 1 Denio, 556, though, if not severed, it would pass by a conveyance or devise of the land; Bank of Pennsylvania v. Wise, 3 Watts, 406; Sallade v. James, 6 Barr, 144; Bear v. Bitzer, 4 Harris, 175; Groff v. Levan, Id. 179, and in the last two cases it was suggested that the reason why a previous sale of the grain would defeat the right of a subsequent purchaser of the land, was because such sale was an implied severance of the grain.

The weight of authority would also seem to determine that trees, sold as timber, and to be presently cut and delivered, or trees and plants growing in a nursery, to be presently transplanted, are also personal property; Anon., 1 Ld. Raym., 182; Smith v. Surnam, supra; Erskine v. Plummer, 7 Greenleaf, 447; Miller v. Baker, 1 Metcalf, 27; Whitemarsh v. Walker, Id. 313; Chafflin v. Carpenter, 4 Id. 580; Yale v. Seely, 15 Vermont, 221. But when the property in the trees is not to pass until they be severed, or if time is to be

ture *with reference to the cases falling within this section in general. The contract, even if [*63] by mere *words*, is not void, but merely incapable of being enforced by action, and therefore it has been held, that if it actually has been executed, for instance in the case of a sale of growing crops, by the vendee's reaping them and taking them away, an action will lie to recover the price, as for goods sold and delivered.

Undoubtedly there is a case (Smith v. Surnam, 9 B. & Cr. 561, 17 E. C. L. R., in which it appears that a contract to sell timber growing was held not to convey any interest in the land; but that was where the parties contracted to sell the timber at so much per foot, and from the nature of that contract it must be taken to have been the same as if the parties had contracted for the sale of timber already felled."

In this case a right of entry to take away the fruit alone was given to the buyer. The rule now, therefore, depends less upon the distinction between the industrial and natural productions of the soil, than upon the question whether the subject-matter of the sale would pass, as incidental to the realty, to the heir, or as personalty to the executor. Whatever would pass to the heir is such an interest in the land as falls within the statute. The rule, however, is not complete, for there are emblements which do not pass to the heir, and yet which may be said to partake of an interest in the land, and to the realization of which the land is essential.

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allowed for them to reach maturity, it would seem that the sale is one of an interest in land, and not of a chattel; Putney v. Deal, 6 New Hamp. 430; Green v. Armstrong, 1 Denio, 550; 5 Barbour's S. C. R. 364. Manure has been held to be part of the realty, whether heaped in a barn-yard or spread upon the ground; Wetherbee v. Ellison, 19 Vermont, 379.

It may be here remarked, that even if the contracts referred to do not fall within the *fourth* section of the statute, because not relating to an interest in land, they must necessarily fall within its *seventeenth* section, because they relate to chattels. Moreover, if the contract is an entire one, as for the sale of the realty with the crops growing upon it, a court has no right to apportion it; and if the sale of the realty be avoided by the statute, that of the personalty will also fall; Rock v. Thayer, 13 Wendell, 53; Loomis v. Newhall, 15 Pick. 166.

(See Parker v. Staniland, 11 East, 362; Poulter v. Killingbeck, 1 B. & P. 397; and see the judgment in Teal v. Auty, 2 B. & Bing. 99, 6 E. C. L. R.)

A curious point has been decided upon this section, with reference to a parol demise of land. Such a demise, if not for more than three years, is good within the first section of the Statute of Frauds, (*a*) the second section containing, as I *stated in the last lecture, express words preserving the operation of

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(*a*) The first section enacts that "all *leases, estates, interests of freeholds*, or terms of years, or any *uncertain interest* of, in, to, or out of any messuages, manors, lands, or tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in *writing* and *signed* by the parties so making or creating the same, or their agents thereunto lawfully authorized *by writing*, shall have the force and effect of leases or estates at will only; and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates notwithstanding."[1]

[1] The second section, however, it is important to notice, proceeds to say: "Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts, at the least, of the full improved value of the thing demised." By the Massachusetts statute, *all* parol leases (without exception as to duration) have the effect of leases at will only; Ellis v. Paige, 1 Pick. 43; Hingham v. Sprague, 15 Id. 102; Hollis v. Paul, 3 Metcalf, 551; Kelly v. Waite, 12 Id. 300. So in Maine; Little v. Pallister, 3 Greenleaf, 15; Davis v. Thompson, 13 Maine, 214. By the New York Revised Statutes (2 Rev. St., p. 194), no estate or interest in land other than leases for a term not exceeding one year can be created, unless by operation of law or by writing. In Connecticut (statute of 1838) such leases are invalid, except as against the grantor. The Pennsylvania statute (1772) is, as to this, exactly copied from that of 29 Car. 2; omitting, however, the part as to the reservation of rent. This part, however, it will be perceived, was evidently inserted in the English statute as a guard against perjury, in supporting a parol lease for three years or less.

such leases. But an *Agreement* for such a lease falls, not within the first, but within the fourth section; for it is an agreement for an interest in lands; and, therefore, though a lease for a year would be perfectly good, though made verbally, an agreement for such a lease cannot be enforced. That was the point decided in Edge v. Stafford, 1 Tyrwh. 293.

"It may be said," said Baron Bayley, delivering the judgment of the Court in that case, "that it is strange that the second section of the statute has made a lease for less than three years from the making valid; and yet, that no action shall be maintainable upon it until it is made effectual as a lease by the entry of the lessee. But, first, the legislature might intend to make a distinction between those cases in which the complaining party was contented to confine himself to its operation as a lease, and sought nothing more than as a lease it would give him, and those in which he went further, and founded upon it a claim for damages, which might far exceed what he could claim under it in the character of a lease; or, secondly, this distinction might not have been contemplated, but may be the result of the true construction of the Statute of Frauds. The first section of that statute provides, all leases, estates, interests of freehold, or term of years, or any uncertain interest in lands, made by livery and seisin only, or by parol, and not put in writing, &c., shall have the force and effect of leases or estates at will only, and excepts nevertheless all leases not exceeding three years from the making thereof, whereupon the rent reserved shall amount to two-thirds of the *full improved value. The fourth section enacts, that 'no action [*65] shall be brought whereby to charge the defendant upon any *contract or sale* of lands, or *any interest* in or concerning them, unless the agreement on which such action shall be brought, or some memorandum thereof, be in writing.' Is, then, the agreement on which this action is brought, '*a contract and an interest in lands?*' Inman v. Stamp says distinctly *it is:* unless that case be successfully impeached, it must govern the present."[1]

[1] "The effect then," said Bayley, J. in Edge v. Strafford, "of the Statute of Frauds, so far as it applies to parol leases, not exceeding three years from the making, is this, that the leases are valid, and that whatever remedy can be had upon them in their character of

Inman v. Stamp, the authority referred to in this judgment, is reported in 1 Stark. N. P. C. 12, 2 E. C. L. R. It distinctly decided that an agreement to occupy lodgings at a yearly rent, the occupation to commence at a future day, was an agreement for an interest in land within the fourth section. In this it was inconsistent with Riley v. Hicks, 1 Str. 651, which must therefore be considered overruled by Edge v. Strafford. (See further as to lodgings, Butter-

leases, may be resorted to; but they do not confer the right to sue the lessee for damages for not taking possession."

Although the statute enacts that all leases by parol for more than three years shall have the effect of leases at will only, yet it has been held, on both sides of the Atlantic, that occupation and payment of rent under such a lease, will create a tenancy from year to year; Clayton v. Blakey, 8 Term, 3. And although the parol lease for more than three years is void under the statute, as to the *duration* of the term, yet the contract will regulate the terms of the holding in other respects, as, for instance, the amount of rent, &c. De Medina v. Poulson, 1 Holt, N. P. R. 47; Richardson v. Gifford, 1 Adol. & Ell. 52; Beale v. Sanders, 5 Scott, 58; Schuyler v. Leggett, 2 Cowen, 660; Edwards v. Coleman, 4 Wendell, 480; Prindle v. Anderson, 19 Id. 391; Hollis v. Paul, 3 Metcalf, 350; M'Dowell v. Simpson, 3 Watts, 135. But under the statute as expressed in Maine and Massachusetts, as *all* leases, unless they be written, are leases at will only, it has there been held that a tenancy created by parol, cannot, by occupation and payment of rent, be subsequently enlarged into a tenancy from year to year; Ellis v. Paige, 1 Pick. 43; Hingham v. Sprague, 15 Id. 102; Kelly v. Waite, 12 Id. 308; Little v. Pallister, 3 Greenleaf, 15; Davis v. Thompson, 13 Id. 214.

A recent English statute (8 & 9 Victoria, c. 106, § 3) has enacted that every lease required by law to be in writing, of any tenements or hereditaments made after the 1st October, 1845, shall be void at law unless made by deed; but Mr. Chitty has remarked of this, that it would probably receive the same construction as the section above referred to, as it would seem not unreasonable to hold that the provisions of the statute would be satisfied by restricting its effect to the avoidance of the lease, *as a lease* simply. Chitty on Contracts, 283, 4th Eng. Ed.

mere v. Hays, 5 M. & W. 456; Mechelen v. Wallace, 7 A. & E. 49, 34 E. C. L. R.; Lord Bolton v. Tomlin, 5 A. & E. 856, 31 E. C. L. R.

The last case provided for is that of *any agreement that is not to be performed within the space of one year from the making thereof.* It has been decided that the *agreements* meant by this section are not *agreements* which may or may not happen to be performed within a year, but agreements which on the face of them contemplate a longer delay than a year before their accomplishment; Peter v. Crompton, Skinner, 353, the case usually cited as establishing this distinction, affords also a very good illustration of it. It was an action upon an agreement in which the defendant *promised for one guinea to give the plaintiff ten on the day of his marriage. The case was [*66] tried before Lord Holt, who reserved the question whether a writing was necessary for the opinion of all the judges, a majority of whom were of opinion "that where the agreement is to be performed upon a contingency, and it does not appear within the agreement that it is to be performed *after* the year, there a note in writing is not necessary, for the contingency might happen *within*[1] the year; but where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note in writing is necessary, otherwise not." There was a difference of opinion among the judges in this case, and it is remarkable that Lord Holt himself differed from the majority.[2]

[1] In the former edition of these lectures, this word has been printed "*after*," but both the sense and the report of the case shows this to be a mistake.

[2] Lord Holt afterwards said (in Smith v. Westall, Raym. 316), that the reason of his opinion was "because the design of the statute was not to trust the memory of witnesses beyond one year."

However, their construction has been frequently adopted since that time; Fenton v. Emblers, 3 Burr. 1281; Wells v. Horton, 4 Bing, 40, 13 E. C. L. R.

One consequence of this section is, that if a servant be hired for a year, and the service is to commence at a future time, the agreement ought to be in writing, since it will not be performed within a year; (Bracegirdle v. Heald, 1 B. & A. 722, 20 E. C. L. R.).(*a*)

[*67] Other instances of the application of *this section will be found in Boydell v. Drummond, 11 E. 142, the facts of which I have already stated in a former lecture; and Birch v. The Earl of Liverpool, 9 B. & C. 392, 17 E. C. L. R.(*b*)[1]

(*a*) Where the terms of the hiring on the face of them extend over a period longer than a year, no parol statements or subsequent acts, such as the payment of quarterly wages, can vary the effect of the written document; Giraud v. Richmond, 15 Law Jour. C. P. 180, [since reported 2 Com. Bench. 835, 52 E. C. L. R.] But where it is expressed in short and in complete terms, as we have previously seen, parol evidence of the situation of the parties is admissible to explain what is *per se* unintelligible; Sweet v. Lee, 3 M. & Gr. 452, 42 E. C. L. R.

(*b*) The statute applies only to agreements of which the entire performance by both parties, in their contemplation, as gathered from the scope and terms of the memorandum, *must necessarily*

[1] It has been held in England (as is mentioned in the note, *supra*), that the words in the statute, "not to be performed," mean not to be performed *on either side*, that is, that an agreement does not come within the statute provided all that is to be done *by one of the parties* is to be done within a year; Donellan v. Reed, 3 Barn. & Ad. 899. There the defendant, who was the plaintiff's tenant under a lease of 20 years, promised, in consideration that the latter would lay out £50 in alterations, to pay an additional £5 annually, during the remainder of the term. The alterations were finished within the year, and to an action for the additional £5, the defendant pleaded that the contract could not possibly be performed within a year, and therefore ought to have been written. But the Court held that as the contract was entirely executed on one side within the year, and

*I have now gone through the five cases to which the fourth section of the Statute of Frauds [*68]

extend beyond the year. To this extent has the doctrine laid down in Boydell v. Drummond, been applied in the very recent case of Souch v. Strawbridge, 15 Law Jour. C. P. 170, since reported in 2 Common Bench, R. 888, 52 E. C. L. R., where the agreement was that the plaintiff should keep the defendant's child so long as the defendant should think proper; and he did keep it for some years. This was held not to require a written memorandum, for "the object of the statute (said Tindal, C. J.) was to prevent frauds by perjury and subornation of perjury, which might set up promises by word of mouth to serve for a long period of years, or to enter into a partnership for life, or promises of a similar nature. The statute merely says, that a party shall not be hurt by evidence of parol promises of such a nature as that. * * * Looking at the terms here, I see nothing which must *necessarily* extend the agreement beyond the

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as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds did not apply. Mr. Smith has questioned the propriety of this decision as being opposed to Peter v. Compton, both in his notes to that case, in the Leading Cases (vol. i. p. 143), and in his "Mercantile Law" (p. 440), but in the very recent case of Cherry v. Heming, 4 Exchequer, 631, the facts and the decision were much the same as in Donellan v. Reed, and the Court, referring to the remarks of Mr. Smith, were of opinion that they were not sufficient to induce them to doubt the authority of that case. On this side of the Atlantic, the construction thus adopted, has been followed in some cases; Holbrook v. Armstrong, 1 Fairfield, 31; Rake v. Pope, 7 Alabama, 161; Johnson v. Watson, 1 Kelly, 348, but rejected in others; Broadwell v. Gitman, 2 Denio, 87; Cabot v. Haskins, 3 Pick. 83; Lockwood v. Barnes, 3 Hill, 128. The practical difference between these classes of cases may be thus explained. "It often happens," as was said in Donellan v. Reed, "in cases of a parol sale of goods, that they are not to be paid for in full till after the expiration of a longer time than a year, and surely the law would not sanction a defence on that ground, where the buyer had had the full benefit of the goods on his part." Under such circumstances, however, it cannot be doubted that although by the operation of the statute, the seller might fail to recover the price of the goods *by the terms of the contract*, he could not fail to recover upon a *quantum valebant;* Poulter v. Killingbeck, 1 Bos. & Pull.

applies, and in which it requires a written memorandum of the contract. There are one or two other

year. If there be an agreement to serve for two years, that is undoubtedly within the statute; but if the agreement be to serve, and that such service may be put an end to on a month's notice, it is not within it." The same case decides that no agreement having reference to an executed consideration is within the statute; the agreement must be prospective, not retrospective.

A contemplated performance of the agreement by either of the parties within the year will take it out of the statute. In the case, for instance, of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer period of time than a year; and the law would not sanction a defence on that ground, when the buyer had had the full benefit of the goods within the year (Donellan v. Read, 3 B. & Ad. 899, 23 E. C. L. R). If either party is to perform his part of the agreement, therefore, within the year, it need not be in writing.

397; Earl of Falmouth v. Thomas, 1 Cromp. & Mees. 109; Teal v. Auty, 2 Brod. & Bing. 99; Philbrook v. Belknap, 6 Vermont, 383; and the difference would therefore be, that under Donellan v. Reed, the plaintiff could recover merely upon proving the contract and its performance on his part, while under the opposite authorities, the benefit to the defendant must be shown.

The point decided in Souch v. Strawbridge, supra, viz., that the statute only applies where, from the terms of the agreement, the contract must necessarily extend beyond the year, was, long before that decision, held the same way in Thorne v. Fox, 10 Johns. 244, where a promise was made by one of a congregation to pay the plaintiff, its pastor, two dollars a-year for his services as such, and he sued for services rendered many years after, and it was held that the plaintiff having received his salary semi-annually, it must be presumed that such was the understanding at the time of the agreement, and hence the contract was not within the statute, because the plaintiff could have withdrawn at any time within the year, and yet recovered his services for the first six months. So in Artcher v. Zeh, 5 Hill, 200, and it seems, also, that whenever the time of the duration of the contract is to depend on the contingency of life, the contract need not be written; Wells v. Horter, 4 Bingham, 40; Thompson v. Gordon, 3 Strobhart, 197; Bull v. M'Crea, 8 B. Monroe, 422, as, for instance, a promise not to carry on the business of a livery-stable

cases of very considerable importance in practice, on which I shall briefly observe in the next lecture, in which a writing is required by the express enactment of the legislature. Having mentioned them, I shall say something of the *consideration* upon which a simple contract may be grounded, and which is, as you are aware, an essential part of such contract; and then having finished the remarks I had to make on Simple Contracts exclusively, shall resume the consideration of the general law of contracts, and shall speak of the *competency* or *incompetency* of the contracting parties, and of *remedies* by which in case of breach of contract, their performance is to be enforced.

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*LECTURE IV. [*69]

SALE OF GOODS, ETC., UNDER THE SEVENTEENTH SECTION OF THE STATUTE OF FRAUDS — CONSIDERATION OF CONTRACTS BY DEED AND OF SIMPLE CONTRACTS.

I CONCLUDED in the last lecture the consideration of the five cases in which the fourth section of the Statute of Frauds renders it necessary that a contract should be reduced to writing. There are, as I then said, one or two other cases, which, being of constant occurrence, it will be right to specify before proceeding to the next branch of the subject.

keeper, because the death of the contracting party might happen within the year; Lyn v. King, 11 Metcalf, 411; a promise to be performed on the death of the promisor; Wells v. Horton, 4 Bingham, 40; Thompson v. Gordon, 3 Strobhart, 197, &c., because the death of the promising party might occur instantaneously. The student will find these and many other cases classified in the American note to Peter v. Compton, 1 Smith's Leading Cases, 375.

The first of these cases is that of a sale for the price of 10*l.* or upwards, regarding which the seventeenth section of the Statute of Frauds has provided as follows:

"No contract for the sale of any goods, wares, or merchandise,(*a*) for the price of 10*l.* or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

The first great difference which you will observe between this section and the fourth section of the same act is, that the fourth section *renders a *writing* [*70] *necessary* in all cases which fall within its terms; whereas the seventeenth mentions three circumstances, any one of which it directs shall be as effectual as a writing, namely, *acceptance of any part of the goods, payment of part of the price*, and thirdly, the *giving something by way of earnest* to bind the bargain; any one of which three things will as effectually perfect the sale as a writing would. Where none of these has taken place, a writing, however, becomes necessary; and if there be none, the bargain is void, and there is no sale; for, to use the words of Mr. J. Bosanquet in Laythoarp v. Bryant,[1] "the fourth section does not avoid contracts not signed in the manner described; it only precludes the right of action. The seventeenth section is stronger, and *avoids* contracts not made in

(*a*) See Humble v. Mitchell, 11 Ad. & Ell. 205, 39 E. C. L. R. [That case decided that shares in a joint stock company, being mere choses in action, and incapable of delivery, were not within this section of the statute, and has been since repeatedly affirmed in England. See note 2 to page 70, infra.]

[1] Reported, 3 Scott, 238, 36 E. C. L. R.

the manner prescribed." A parol sale, therefore, unaided by any of the three formalities mentioned in the seventeenth section as equivalent to writing, is totally and entirely void.

A doubt was entertained at one period whether the seventeenth section included the case of a contract for something not in existence in a chattel estate at the time of making the bargain, but which was to become a chattel before the time agreed upon for its delivery. Where, for instance, growing timber was bargained for, to be delivered cut into planks, or a ship or a carriage not yet built.[1] However,

[1] It was formerly held that *executory* contracts were not within the statute, but that it was confined to cases where the buyer was immediately answerable; Towers v. Osborne, Strange, 506; Clayton v. Andrews, 4 Burrow, 2101; but this distinction was doubted by Lord Thurlow, in 3 Brown's Cas. in Ch. 355, and was subsequently overruled; Rondeau v. Wyatt, 2 H. Black. 63; Cooper v. Elston, 7 Term 14.

The statute of 9 Geo. 4 has not been generally re-enacted in this country, and hence the English cases upon the construction of this part of the Statute of Frauds before its alteration, have still a practical application here. The first case was Towers v. Osborne, already cited, where the defendant bespoke a chariot, and refused to take it when made, and the Court held that a writing was not necessary, for the statute "related only to contracts for the actual sale of goods, when the buyer is immediately answerable, without time given him by special agreement." Then came Clayton v. Andrews, supra, where the plaintiff agreed to deliver a load and a half of wheat within a month, at so much a load, to be paid on delivery, the wheat being then unthreshed, and the Court, on the authority of Towers v. Osborne, held the case not to be within the statute, rather, however, on the ground of the contract being executory, than because the wheat did not then exist in the form in which it was to be delivered. Then these two cases were, as has been said, overruled as to the distinction between executed and executory contracts. Then in Garbutt v. Watson, 5 Barn. & Ald. 613, 7 E. C. L. R., the contract was for the delivery of flour, which was then unground wheat, and the Court said that "in Towers v. Osborne, the chariot which was ordered to be made would never, but for that

[*71] any doubt that formerly existed on this subject is *now put an end to, for by stat. 9 Geo.

order, have had any existence. But here the plaintiffs were proceeding to grind the flour for the purposes of general sale, and sold this quantity to the defendant as part of their general stock. The distinction is indeed somewhat nice, but the case of Towers v. Osborne is an extreme case, and ought not to be carried further," and it was said that the question was whether the contract was for the sale of goods, or for work and labour and materials found; and the case of Clayton v. Andrews, which was scarcely distinguishable from the present one on this point, was said to have been also incorrectly decided upon the point of the condition of the wheat. Subsequent cases have held that contracts to sell oil not then expressed from seed (Wilks v. Atkinson, 6 Taunton, 11), to supply a house with pipes to be laid in a specified manner (West Middlesex Co. v. Suwerkropp, Mood. & Malk. 408), to make a copper-plate press to be ready in three months (Pinner v. Arnold, 2 Cr. Mees. & Rosc. 613, overruling Buxton v. Bedell, 3 East. 304), and the like, are within the statute, and must therefore be written; but a contract to deliver a quantity of oak pins which were not then made, but were to be cut out of slabs, being merely an agreement for labour to be done upon materials found, was held not to be a "contract for the sale of goods," for the things to be delivered did not exist *in solido*, and would be incapable of delivery, Groves v. Buck, 3 Maule & Selw. 178. In this country, the distinction between the contract being executed and executory has also been disregarded; Bennett v. Hull, 10 Johnson, 364; Crookshank v. Burrell, 18 Id. 58; Jackson v. Covert, 5 Wendell, 141; Cason v. Cheely, 6 Georgia, 554. As respects the condition of the subject of the contract, it has been truly said, that "the difficulty arises not so much from any uncertainty in the rule as from the infinitely various shades of different contracts. If it is a contract to sell and deliver goods whether they are then completed or not, it is within the statute. But if it is a contract to make and deliver an article or quantity of goods, it is not within the statute," per Shaw, C. J. in Gardner v. Joy, 9 Metcalf, 179; and the same judge subsequently thus laid down the rule: "When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labour; otherwise, where the article is made pursuant to the agreement;" Lamb v. Crafts, 12 Id. 356; Cason v. Cheely, 6 Georgia, 554. Thus, agreements to make the woodwork of a wagon, to be

4, c. 14, s. 7,[1] it is enacted, that the seventeenth section of the Statute of Frauds

"Shall extend to all contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended

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paid for in lambs at one dollar a head, Crookshank v. Burrell, 18 Johns. 58, to completely line with cloth selected by defendant, a buggy of which the body existed in an unfinished state, Mixer v. Howarth, 21 Pickering, 204, to make ten stave machines, and find the materials, Spencer v. Cone, 1 Metcalf, 283, to make twelve surgical adjusters, and find the materials, Allen v. Jarvis, 20 Connecticut, 38, to furnish as soon as practicable, 1000 or 1200 malleable hoe shanks, agreeably to patterns furnished, Hight v. Ripley, 19 Maine, 137, were, respectively, held not to be contracts within the statute; see Cummings v. Dennett, 26 Id. 397; but a contract for the purchase of one hundred boxes of candles, the time of delivery not being mentioned, but the defendant stating that they were not yet manufactured, but he would manufacture and deliver them in the course of the summer, was in a late case held to be a "sale of goods" within the statute; Gardner v. Joy, 9 Metcalf, 179. So of cider not yet manufactured, Seymour v. Davis, 2 Sandford's S. C. R. 241, wheat not yet threshed, Downs v. Ross, 23 Wendell, 274, and cotton to be packed in bales, Cason v. Cheely, 6 Georgia, 554. In Maryland, in 1821, the case of Eichelberger v. M'Cauley, 5 Harris & Johns. 214, was for the delivery of unthreshed wheat, and on the authority of Clayton v. Andrews, the contract was held not to be within the statute, but the late authorities seem generally to agree in condemning the decision of that case, and say, moreover, of Towers v. Osborne, that it was rightly decided, but upon a wrong reason.

It has been held in England that contracts for the sale of shares in a joint stock banking company, or in a railway company, or of foreign stock, need not be in writing as not coming within the term "goods, wares, or merchandise;" Humble v. Mitchell, 11 Ad. & Ell. 205; Bowbly v. Bell, 3 Com. Bench, 284, Id. 249; Duncroft v. Albrecht, 12 Simons, 189; Hazeltine v. Siggens, 1 Excheq. 867; but in Colvin v. Williams, 3 Harris & Johns. 38, and Tisdale v. Harris, 20 Pickering, 9, the statute was differently construed (in Gadsden v. Lance, 1 M'Mullan, Ch., 87, this point was left undecided), and in Baldwin v. Williams, 3 Metcalf, 365, the authority of Tisdale v. Harris was confirmed, and the statute held to apply also to sales of promissory notes.

[1] This statute did not extend to Scotland.

to be delivered at some future time, or may not, at the time of such contract, be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."(a)

(a) Much litigation has arisen on what constitutes acceptance such as to satisfy the statute. Acceptance by the buyer of goods is in all cases essential to give the seller of them a right of action upon the contract; nor is there any difference in the sort of acceptance required in such cases, whether they are or are not within the operation of this statute. In order to an acceptance by the buyer there must have been a delivery by the seller; and there must be both in order to satisfy this clause of the seventeenth section.

A delivery of goods must be an actual transfer of the possession to the buyer by the seller, with an intent thereby to pass the property, so as to deprive himself of the right of lien for the price of them. Thus, where goods are merely placed in the hands of a del credere agent, though ordered by the buyer, who directs them to be marked with his mark, this is no delivery, for the agent, not being the buyer's agent but the seller's, the seller has not parted with the possession or divested himself of the property in the goods. (Bill v. Baiment, 9 M. & W. 36; Baldey v. Parker, 2 B. & Cr. 37, 9 E. C. L. R.) Even a delivery order for goods upon a dock company, given by the seller to the buyer, would not constitute delivery, according to Abbott, C. J., "until the dock company had accepted the seller's delivery order, and by so doing, assented to hold the wine, as the agents of the buyer." (Bentall v. Burn, 3 B. & C. 423, 10 E. C. L. R.)[1] On the

[1] The facts in this case were these. It was an action brought by the assignees of a bankrupt to recover the price of a cask of wine sold by him to defendant. At the time of the contract a delivery order and invoice were given. Some months after, the defendant being called on for payment, said that the former order had been lost, and that the wine had not been transferred to him in proper time, and he had consequently lost the sale of it—that he had not been allowed to taste it. It was held *per curiam* that the acceptance of the delivery order was not equivalent to an actual acceptance of the goods within the meaning of the statute. There could be no real acceptance till the Dock Company assented to hold the wine as the agent of the vendee. They held it originally as the agents of the vendors, and as long as they continued so to hold it the property was unchanged. It had been urged that the Dock Company were bound by law when required to hold the goods on account of the vendee. That

*Where a writing is relied on to satisfy the provisions of the seventeenth section, the rules [*72]

same principle, a transfer of wine, sold by parol, in the books of the *London Dock Company*, would, if made by the vendee's

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might be true, and they might render themselves liable to an action for refusing to do so, but if they did wrongfully refuse to transfer the goods to the vendee, it was clear that there could not then be any actual acceptance of them by him until he actually took possession of them.

The student will observe that the words of the statute are, "unless the buyer shall *accept* part of the goods so sold, and *actually receive* the same;" hence, this decision must be distinguished from that class of cases in which, although there may not have been a sufficient acceptance and actual receipt to satisfy the statute, there may have been such a delivery on the part of the seller as would divest him of the title as against his creditors. Such is the application of the following remark of Shaw, C. J., in The Plymouth Bank v. Bank of Norfolk, 10 Pick. 459: "A sale for a valuable consideration, and an order on the depositary to deliver, and notice to him of such order, is a valid sale to divest the property of the vendor, whether the depositary obeys the order and delivers the property, or sets up a title or lien, and claims to hold it for himself." And such is the ground upon which such cases as Hollingsworth v. Napier, 3 Caines, 182, Barney v. Brown, 2 Vermont, 374, Tuxworth v. Moore, 9 Pick. 347, Appleton v. Bancroft, 10 Metcalf, 236, Linton v. Butts, 7 Barr, 39, &c., turn. The decision in Bental v. Burn, has been very recently affirmed by the Court of Exchequer in a case where Farina, the well-known manufacturer at Cologne, shipped to the defendant a lot of Eau de Cologne, which he had verbally ordered some time before. It was accordingly sent to the plaintiff's agent at London, who warehoused it with a wharfinger, who informed the defendant of its arrival. A delivery warrant was given at the time by the agent to the wharfinger, who sent it to the defendant. The latter kept the warrant for ten months, and then said he had never ordered the goods. The Court held that although there might have been evidence to go to the jury of the *acceptance* of the goods by retaining the delivery warrant, yet there was no evidence of the *actual receipt* of the goods, that is, the delivery of the possession of the goods on behalf of the vendor to the vendee, and the receipt of the possession by the vendee. "The warrant," said Baron Parke, "is no more than an engagement by the

[*73] *which govern the case are very analogous to those which I have already stated with regard

assent, amount to a symbolical delivery. (Proctor v. Jones, 2 C. & P. 535, 12 E. C. L. R., per Best, C. J.) And where the plaintiff, who was a horse dealer and livery-stable keeper, offered two of his horses for sale to the defendant, who sent word that "the horses were his, but, that as he had neither servant nor stable, the plaintiff must keep them at livery for him;" and the plaintiff accordingly removed the horses out of his sale stable into another stable, this was held to be a sufficient delivery, the plaintiff having thereby given up his lien for the price, and retained the horses merely at livery for the buyer. Elmore v. Stone, 1 Taunt. 458.[1]

Where goods are delivered to a third party, as to a carrier or

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wharfinger to deliver to the consignee or any one he may appoint; and the wharfinger holds the goods as the agent of the consignor (who is the vendor's agent), and his possession is that of the consignee until an assignment has taken place, and the wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him. Then and not till then the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and then only is there a constructive delivery to him." Farina v. Home, 16 Mees. & Wels. 119; Shindler v. Houston, 1 Comstock, 261; Clark v. Tucker, 2 Sandf. S. C. R. 157; Astey v. Emery, 4 Maule & Selw. 262.

[1] Elmore v. Stone belongs, however, to a class of cases which are now generally considered as overruled. These cases are Chaplin v. Rogers, 1 East, 192; Anderson v. Scott, 1 Campbell, 335; Hodgson v. Le Brett, Id. 233; Hurry v. Mangles, Id. 452; and Blinkinsop v. Clayton, 7 Taunton, 597. The last of these decisions was in 1817, and from that time the current of authority set the other way. Thus, in Howe v. Palmer, 3 Barn. & Ald. 321, the authority of Elmore v. Stone was said to be supported only on the ground that expense was incurred on account of and by the direction of the buyer; "but I must say," said Sir John Bayley, "that I doubt the authority of that case." In Anderson v. Scott, supra, which was assumpsit for non-delivery of wine, Lord Ellenborough had held that the cutting off of the pegs by which the wine was tasted, and marking the plaintiff's initials by the defendant's agent, in the presence of all parties, amounted to a delivery under the statute. But in the subsequent case of Proctor v. Jones, 2 Car. & Payne, 532, this decision was overruled. The defendant had wine

to *the fourth. The signature must be by the party to be *charged*, or his agent,(*a*) as in cases [*74]

wharfinger, the question of delivery must depend upon the question whether such third party was appointed by the buyer; if so, delivery

in the docks marked with his initials, and the terms of payment were settled at a subsequent conversation, and it was held that it was the intention of the statute that there should be as complete a delivery as could be according to the nature of the article. It could not be said in this case that the defendant *actually received* the goods. The vendee could not have maintained trover if the goods were not delivered, for the seller would have a lien on them for the price, as there was no stipulation as to payment at a future time. But not only was there no delivery, but there was no complete contract at the time of the marking, for at that time, the time of payment was not agreed upon. If there was no complete contract at the time of the marking, the marking could not be an acceptance within the statute, against whose express words Anderson v. Scott was said to be directly opposed, and upon Elmore v. Stone being cited, it was said by Best, Ch. J., that that case had been overruled. Then came Tempest v. Fitzgerald, 3 Barn. & Ald. 680, 5 E. C. L. R., and Carter v. Toussaint, 5 Id. 855, both cases of horses, and both very similar to Elmore v. Stone, the latter case being scarcely distinguishable from it, and it was held that there was *no* receipt within the statute. Then came Baldey v. Parker, 2 Barn. & Cress. 37, 9 E. C. L. R., which was very similar to Anderson v. Scott and Hodgson v. Le Brett, and was decided in opposition to those cases. Since then, the cases of Smith v. Surnam, 9 Barn. & Cress. 561, Maberly v. Shepherd, 10 Bing. 99, and Bill v. Baiment, 9 Mees. & Wels. 37; and in this country Dole v. Stimpson, 21 Pick. 387, and Shindler v. Houston, 1 Comstock, 261, 273 (reversing the judgment in 1 Denio, 48, which was decided on the authority of Chaplin v. Rogers), may be referred to as farther illustrating the disposition to carry out the words of the statute as to "actual receipt," which, as Parke, J. observed, in Smith v. Surnam, "the Court, in the older cases, did not advert to." Indeed it is evident, as was remarked in Proctor v. Jones, supra, that the Statute of Frauds, like the Statute of Limitations, was formerly looked upon with so little favour, that the judges appeared anxious to get it off the statute book.

(*a*) It may be written anywhere, as long as it was the intent of the party that it should operate as a memorandum. Johnson v. Dodgson, supra.

[*75] arising* under the fourth section; but neither under the fourth nor the seventeenth sections is

to such carrier or wharfinger would be delivery to the buyer. (Richardson v. Dunn, 2 Q. B. 218, 42 E. C. L. R.; Dawes v. Peck, 8 T. R. 330.)[1] Where the goods are sent to a third party, or a place not belonging to but customarily used by the buyer, the question must be determined by the principle we have stated, and the question whether the seller does or does not retain a power over them inconsistent with the property being in the buyer. Dodsley v. Varley, 12 A. & E. 632, 40 E. C. L. R.

The delivery of a portion or sample of the goods sold will suffice where it is intended thereby to invest the buyer with the property in them. (Hinde v. Whitehouse, 7 East, 558); [Mills v. Hunt, 17 Wendell, 333, S. C. 20 Id. 441; Dawson v. Osborn, 1 Pick. 476.] In all cases the goods must be received by the buyer, or some one as his agent, to constitute delivery.

Delivery implies receipt, but not acceptance. Nothing can be more distinct than the receipt and acceptance of goods; for the latter means such an acceptance as affords the purchaser reasonable time and opportunity to examine both the quality and quantity of the goods delivered; such a possession as precludes him from any longer objecting to the goods alone satisfies the statute, and dispenses with a written memorandum.[2] There cannot, therefore, be acceptance without receipt, but there is often receipt without acceptance. See Howe v. Palmer, 3 B. & Ald. 326, 5 E. C. L. R.; Hanson v. Armitage, 5 B. & Ald. 557, 7 E. C. L. R., and Johnson v. Dodgson, 2 M. & W. 656, where Lord Abinger, C. B. puts the case thus:—"If the purchaser sent his own servant for the goods, and when they were brought, sent them back, as not answering the contract, he could not be said to accept them." (See also Maberley v. Sheppard, 10 Bing. 99, 25 E. C. L. R., and Baldey v. Parker, 2 B. & Cr. 440, 9 E. C. L. R.)

Wherever the buyer has dealt with the goods as his own, either by

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[1] Outwater v. Dodge, 6 Wendell, 397; Snow v. Warner, 10 Metcalf, 131–138.

[2] Thus an agreement that the price of goods sold, shall be applied to a debt due from the seller to the buyer, is not sufficient to take the case out of the statute, unless the application is actually made by giving a receipt or otherwise; Clark v. Tucker, 2 Sandford's Sup. Court R. 157; Walker v. Mussey, 16 Mees. & Welsby, 302.

there any *necessity for the agent's being appointed by writing. Under the seventeenth section, [*76]

using or reselling them, he cannot afterwards repudiate the contract, and the acceptance is complete; such evidence must be unequivocal, and the question whether it is so or not, under all the circumstances, is fact for the jury rather than matter of law. Eden v. Dudfield, 1 Q. B. 302, 41 E. C. L. R.; Chapman v. Morton, 11 M. & W. 534, are among the most recent decisions on this point.[1]

[1] It may be here observed, that there may be an acceptance of goods within the Statute of Frauds, which may not, however, be such an acceptance as would support an action for goods sold and delivered. It is true, that in Norman v. Phillips, 14 Mees. & Welsby, 277, Alderson, B. said that acceptance and delivery under the statute, meant such an acceptance as precludes the purchaser from objecting to the quality of the goods, and such is the earnestly expressed opinion of the author of these lectures, in his work on Mercantile Law. The opinion expressed, however, in Boulter v. Arnott, 2 Crompt. & M. 333, is the other way, and the recent case of Curtis v. Pugh, 10 Queen's Bench, 111, shows that such a distinction may fairly exist. The defendant had verbally ordered three hogsheads of glue, to be of the kind called "Cox's best." The glue was sent to the warehouse of the defendant, who removed it into twenty bags, and finding it inferior in quality, at once notified the plaintiff, who refused to take it back because of the unpacking, and brought assumpsit for goods sold and delivered. The defendant asked for a nonsuit on the ground of there being no contract within the statute, he not having "accepted" the glue, and there being no memorandum in writing. Lord Denman, before whom the case was tried, was of opinion that altering the condition of the glue was an acceptance, and left it to the jury to say whether the defendant had dealt with the glue as his own, or had done no more than was necessary for its examination, and they found a verdict against the defendant on this point. But the verdict was set aside on the ground of misdirection, Lord Denman agreeing that he had gone too far, in holding that any unnecessary alteration must be taken as an acceptance, and Patterson, J. said, "A confusion sometimes arises in applying the Statute of Frauds to the case of goods sold and delivered. If the purchaser actually takes the goods sold into his possession, that is an acceptance, independent of the statute. But there may be an acceptance sufficient to satisfy the statute, which may not yet support an action for goods sold and delivered."

as well as under the fourth, several documents may be read together as making up the contract, provided they

The buyer may also accept by lapse of time after the receipt of the goods. It is distinctly stated in the judgment of Lord Abinger, C. B., in Chapman v. Morton, that if the buyer intends to renounce the contract, he ought to give the plaintiffs distinct notice at once that he repudiates the goods, and not prevent the sellers from dealing with them as theirs. In Richardson v. Dunn, where a smaller quantity of coals than were ordered were shipped to the purchaser in a vessel other than that named by him, and an invoice and letter were sent to him stating the facts; it was there held by the Court of Queen's Bench, that "*silence for a week*" on the part of the buyer was "tantamount to assent," and he was liable in assumpsit for the price of the goods. (See, also, Coleman v. Gibson, 1 M. & Rob. 168.) The same doctrine was applied in the case of Bushel v. Wheeler, 8 Jurist, 532, to acceptance under the seventeenth section of the Statute of Frauds. Where goods were placed in the warehouse of a carrier selected by the purchaser, who allowed them to remain there six or seven months, when he informed the warehouseman that he did not intend to take them; and this was held to justify the jury in finding an acceptance—a constructive, though not a manual one. Subsequently the Court of Exchequer stated a different doctrine, in the case of Norman v. Phillips, 14 M. & W. 277, where the buyer, under precisely similar circumstances, had allowed goods to remain at a station of the Great Western Railway, where he had desired them to be sent, informing the people there that he should not take them at the time, but allowing eight weeks to elapse before he apprised the seller of the repudiation. The Court held that this was an evidence on which the jury ought not to have found an acceptance, because the goods were not in the possession of the party himself, or an agent authorized by him to examine the quality of the goods, but merely of a carrier, who was an agent only for the purpose of carrying; and that he, not being an agent to accept the goods in the first instance, could not become so by lapse of time (per Alderson, B.) It is difficult to reconcile this decision with the principle established in the previous judgments. The seller had completed the delivery, for he had delivered precisely as he had been directed to do by the buyer; his lien and power of stoppage *in transitu* were gone (see Wilmhurst v. Bowker, in error, 7 M. & Gr. 882, 49 E. C. L. R.); he had wholly parted with his property in and control over the goods, and had appropriated them to the purchaser (see Wilkins v. Bromhead, 6 M. &

be sufficiently connected in sense among themselves,

Gr. 963, who had full power to examine them, and his not having done so was entirely his own act and default. If the carrier was not the party to examine, nor an agent to accept, neither was he to repudiate; and there can be little question that eight weeks' silence is an unreasonable delay, especially when an invoice of the goods had been received; and this is perfectly consistent with the law as laid down in Johnson v. Dodgson, supra. It is humbly submitted that the current of previous decisions will prevail; and that, wherever the seller has done his part in delivering the goods sold into the control or possession of the buyer, in accordance with the directions given by him, after the lapse of a reasonable time for their examination, there is an implied assent to keep them; and, if no repudiation of the contract be then made to the seller, the acceptance is complete. What is reasonable time must be always a question for the jury, having regard to the nature of the goods and the usages of trade. Any other doctrine would seriously disturb the accustomed transactions of commerce. For the remaining points relating to Delivery and Acceptance, not under the Statute of Frauds, see post, tit. Sale of Goods.

Wherever different goods, or several classes of the same goods, are bought at the same time, and form one contract, acceptance of part is acceptance of the whole. [Elliot v. Thomas, 3 M. & W. 170; Williams v. Burgess, 10 Ad. & Ell. 499, 37 E. C. L. R.; Slubey v. Hayward, 2 H. Bl. 504; Parks v. Hall, 2 Pickering, 213; Mills v. Hunt, 17 Wendell, 375; S. C. 20 Id. 431.] And if a man enters into an entire and single agreement for goods made and others to be made, his accepting part of the goods made is evidence of the whole agreement and of acceptance, and will take the case out of the statutes, both as respects the goods made and those to be made. See Scott v. Eastern Counties Railway, 12 M. & W. 33, where Lord Abinger, C. B. says: "Can it be said that if a man goes to a tailor's shop and buys a suit of clothes which are ready made, and at the same time orders another suit to be made for him, and the former are sent home to and accepted by him, he is not bound to pay for the latter? The two statutes (the Statute of Frauds and the 9 Geo. 4, c. 14, s. 7) that have been referred to, must be construed as incorporated together; and then it is plain that where an order for goods made, and for others to be made, forms one entire contract, acceptance of the former goods will take the case out of the statutes as regards the latter also." It is obvious that this rule precludes the prin-

[*77] without the aid of parol *evidence; (see Philli-

ciple of giving an opportunity to object to quality as regards the goods to be made; but such is the law at present.[1]

[1] This suggestion of the annotator would, however, apply rather to the law as it formerly stood, than as it has been modified in the last thirty years. The student will remember that at common law a defendant was driven to a cross action, in order to establish a breach of warranty of either title or quality of goods, but a host of recent cases, on both sides of the Atlantic, following the spirit of the statutes of set-off, allow, in an action for the contract price, a defence founded on the breach of contract, by reason of the bad quality of the article. Such a defence is called, in New York, *recoupement*, and in Sedgwick on Damages, Mondel v. Steele, 8 Mees. & Welsby, 858; Withers v. Green, 9 Howard (U. S.), 214, and the notes to Chandelor v. Lopus, 1 Smith's Leading Cases, 202, and Cutter v. Powell, 2 Id. 28, the law will be found fully explained. Although, therefore, in the case put by the annotator, a defendant who had accepted part of goods under an entire contract, might be held to have so far accepted the whole as to be liable to an action for not accepting, if he refused the remainder because of the bad quality, yet it is apprehended that he would still be permitted to show how much less the goods were worth, by reason of the breach of contract.

It must be borne in mind that the acceptance of part of the goods must be *at the time* of the contract, not afterwards. In Scott v. The Eastern Counties Railway, cited supra, the contract was for lamps, one of which, of a very peculiar character, was to be manufactured, and required some time for its completion. The others were delivered at or about the time of the contract. But if none of the lamps had been presently delivered, the case would have been differently decided. This is strikingly illustrated by the late case of Seymour v. Davis, 2 Sandf. S. C. R. 240, where the contract was for the delivery of several hundred barrels of cider, be to procured from farmers, sent on at the seller's convenience, and paid for at a future time. There was no written evidence or part payment, and no present delivery, the cider not being made. Several parcels of cider were sent and paid for except the last 100 barrels, and in assumpsit for the price of these, the defendant took the point that his acceptance of part of the cider took the case out of the statute and made the contract one entire transaction, so as to enable him to recover damages by reason of the inferior quality of the barrels of cider which he had *previously* received and paid for. But Sandford, J., who delivered the opinion, said, "the

more v. Barry, 1 Camp. 513; Jackson v. Lowe,

Where goods are sold in distinct lots, as by auction, acceptance of one lot by no means constitutes acceptance of another. They form separate contracts. Roots v. Lord Dormer, 4 B. & Ad. 77, 24 E. C. L. R. So, where distinct terms attach to the bargain for different articles, though bought at the same time, there is no longer an entire contract, and acceptance of one article is not acceptance of the other. Price v. Lea, 1 B. & Cr. 156, 8 E. C. L. R.[1] Acceptance of samples

statute declared such a contract to be absolutely void. It was undeniably void when it was made, and from the month or two intervening between that time and the first delivery of the cider, did the acceptance of that first parcel breathe into this void contract the breath of life, and make it valid for the whole quantity of goods embraced in it? We cannot so regard the effect of such a partial delivery. We think the contract, if void when it is made, can never become a valid agreement. Subsequent acts may establish a new contract of sale, between the parties, either express or implied, and embodying more or less of the terms of the original agreement, but they cannot reanimate the previous void agreement. For each delivery of cider, the sellers were entitled to be paid, not by force of the void contract of sale, but by force of a new one, founded on the receipt and acceptance of the specific goods." The student will observe of this case, that the plaintiff very properly brought his action, not on the contract, but in assumpsit for goods sold and delivered, and the effort of the defendant was not, as generally happens, to endeavour to defeat the plaintiff's case by showing it void, as being contrary to the statute, but to take the case *out of* the statute, and thus make it an entire and good contract, and so let in his recoupement.

[1] In the very recent case of Canliffe v. Harrison, 21 Law Jour. R. 325, 5 Eng. Law & Eq. R. 539, the defendant had verbally ordered ten casks of claret, in answer to which the plaintiff sent fifteen, and the former wrote that as he had only ordered ten, he would take those if they proved satisfactory, and would hold the others on plaintiff's account. The latter answered that the wine was superior, and that the defendant could ascertain in the spring if he would have room for it, and the defendant then placed it in the bonded warehouse, in his own name. He soon after tasted, and disapproved of it, but gave no notice of his disapproval till the next April, and in May he refused to take the wine, when the plaintiff brought assumpsit for goods sold and delivered. It was held by the Court of Exchequer that a nonsuit must be ordered, as the delivery of more than the amount ordered was another contract.

1 Bing. 9, 8 E. C. L. R.(*a*) It was, indeed, said by Lord Ellenborough, in Egerton v. Matthews, 6 East, 307, that the word *Bargain*, used in this section, does

constituting a part of the bulk sold to the buyer, takes the whole contract out of the statute. Hinde v. Whitehouse, 7 East, 570.[1]

Earnest or payment of part of the purchase-money equally satisfies the statute, however small the sum paid may be. It is obviously attended by few of the niceties which beset the principle of acceptance, nor does it transfer control over the goods possessed by the seller, whose lien remains unimpaired. (Goodall v. Skelton, 2 H. Blacks. 316.) Earnest merely binds the bargain, and satisfies the Statute of Frauds (see Blenkinsop v. Clayton, 7 Taunt. 597, 2 E. C. L. R.), although it seems an unsettled question how far payment of earnest transfers the right of property. Back v. Owen, 5 T. R. 409, and Bull. N. P. 50.

(*a*) See also other instances of the same rule in Gosbell v. Archer, 2 Ad. & Ell. 500, 9 E. C. L. R.; Cooper v. Smith, 15 East, 103; Johnson v. Dodgson, supra; Dobell v. Hutchinson, 3 Ad. & Ell. 355, 30 E. C. L. R.; Laythoarp v. Bryant, 2 B. N. C. 735, 29 E. C. L. R.

Bought and sold notes fall under the same category, and, if they agree, bind the contract (Gregson v. Ruck, 4 Q. B. 737, 45 E. C. L. R.); but where they vary, the broker's book cannot be referred to, and there is no contract (Grant v. Fletcher, 5 B. & C. 436, 11 E. C. L. R.[2]; Hawes v. Forster, 1 Moo. & Rob. 368), unless it be shown that a broker's book was known to the parties. Thornton v. Charles, 9 M & W. 809, per Lord Abinger, C. B. See Pitts v. Beckett, 13 M. & W. 743. See, also, Trueman v. Loder, 11 Ad. & Ell. 589, 39 E. C. L. R. [In the very recent case of Sivewright v. Archibald, 15 Jurist, 947, 6 Eng. Law and Eq. R. 286, where all the preceding authorities are commented on, the Court of Queen's Bench were divided as to the admissibility of parol evidence where the bought and sold notes disagreed.]

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[1] Acceptance *after action brought* will not, however, satisfy the statute, so as to entitle the vendor to recover in that action; Bill v. Baiment, 9 Mees. & Wels. 37; Eastwood v. Kenyon, 11 Ad. & Ell. 438.

[2] Such was by no means the effect of the language used by Ch. J. Abbott in Grant v. Fletcher, and the case was decided on the ground of the broker's entry not having been *signed* by him. See supra, note to p. 36.

not render so strict a statement of the transaction necessary as the word *Agreement*, used in the fourth of matters within that section. It has, however, been decided that the names of both *parties* must appear in the *memorandum*, though the signature of the party *to be bound* alone is requisite; for, as the Court observed, there cannot be a *bargain* without two parties, and, therefore, a memorandum naming one only is not a memorandum of a bargain; Champion v. Plummer, 1 B. & P. 252. And the price ought to be stated, if one was agreed on, for that is part of the bargain; Elmore v. Kingscote, 5 B. & C. 583, 8 E. C. L. R. If none be named, the parties must be understood to *have agreed for what the thing is reasonably worth. (a) [*78]

Another case in which the legislature has required that a particular contract should be made in writing, is *that in which a certificated bankrupt promises to pay a debt from which his bankruptcy and certificate had discharged him.* A promise to pay such a debt is valid, for the existence of debt is a consideration for making such a promise, even though the *remedy* which originally existed for its recovery has been taken away by the bankruptcy; see Trueman v. Fenton, Cowp. 544.[1]

(a) Thus an order for goods "on moderate terms" is a sufficient memorandum within the seventeenth section of the Statute of Frauds. Ashcroft v. Morrin, 4 M. & Gr. 450, 43 E. C. L. R.

[1] Maxim v. Morse, 8 Mass. 127; Field's Estate, 4 Rawle, 351; and in the absence of fraud, there is no objection to a promise made *before* certificate of bankruptcy granted; Kingston v. Wharton, 2 Serg. & Rawle, 208; Kirkpatrick v. Tattersall, 13 Mees. & Welsby, 766. The student will have observed, in former parts of these lectures and the notes, that a past consideration is said not to be sufficient, of itself, to support a promise, as, for instance, in the case of a guarantee of an antecedent debt, while at the same time it is equally

But as it was considered by the Legislature desirable to prevent bankrupts from carelessly and improvidently reviving, by fresh promises, those demands from which it is the policy of the Bankrupt Laws to discharge them, statute 5 & 6 Vict., c. 122, s. 43, enacts:

"That no bankrupt, after his certificate shall have been confirmed, shall be liable to pay or satisfy any debt, claim or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim or demand, upon any contract, promise, or agreement made or to be made after the suing out of the commission, unless such contract or agreement be in writing, signed by the bankrupt, or by some person lawfully authorized in writing by the bankrupt."

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true, that a debt whose remedy is barred by the statutes of bankruptcy or limitation, forms a sufficient consideration (and that, not a moral one, for that idea has been latterly repudiated) to support a promise to pay it. This apparent inconsistency will be attempted to be explained in another place.

But although a promise may be thus supported, yet it cannot go beyond the limits of the debtor's original liability; it may fall short of the extent of that liability, as by being a promise to pay in instalments, or when able, &c., but it cannot exceed it, nor will such a consideration support a promise to do another and a collateral thing. This has been lately thus forcibly expressed by Parke, B., "Debts so barred are unquestionably a sufficient consideration for every promise, absolute or unqualified, qualified or conditional, to pay them. Promises to pay a debt simply, or by instalments, or when the party is able, are all equally supported by the past consideration, and when the debts have become payable instanter, may be given in evidence in the ordinary declaration in indebitatus assumpsit. So, when the debt is not already barred by the statutes, a promise to pay the creditor will revive it, and make it a new debt, and a promise to an executor to pay a debt due to a testator, creates a new debt to him. But it does not follow that though a promise revives a debt in such cases, any of those debts will be a sufficient consideration to support a promise to do a collateral thing, as to supply goods, or perform work and labour; and so, indeed, it was held in this Court, in the case of Reeves v. Hearne, 1 M. & W. 323. In such case it is but an accord unexecuted, and no action will lie for not executing it;" Earle v. Oliver, 2 Exchequer, 89.

There was a precisely similar clause in stat. 6 Geo. 4, c. 16, except that the word *allowed* was *used instead of *confirmed*. The effect of this is, that [*79] a bankrupt may still, by a new promise, bind himself to pay a demand proveable under his bankruptcy, but that new promise must be reduced to writing, and signed by himself, or his agent authorized in writing.

Another case provided for by express enactment is that of *an infant*. There are many contracts which, when entered into by an infant under the age of twenty-one years, are invalid, as I shall have occasion to explain to you at greater length when I arrive at that part of the subject which relates to the *competency* of parties to contracts, but which are capable of being ratified by the infant when he arrives at his full age of twenty-one. This ratification might, at common law, have been by parol, but by 9 Geo. 4, c. 14, s. 5,[1] no action shall be maintained whereby to charge any person upon any promise made *after full age* to pay any debt contracted *during infancy*, or upon any ratification after full age of any promise or simple contract made during infancy, *unless* such promise or ratification be *in writing*, signed by the party to be charged therewith.[2] See, on the construction of this Act, Hartley v. Wharton, 11 A. & E. 934, 39 E. C. L. R.(*a*)

(*a*) The memorandum in that case was without date or address, and was thus worded: "I am sorry to give you so much trouble in calling; but I am not prepared for you, but will, without neglect, remit you in a short time." This was held sufficient, it being not necessary that the sum should be named, or that the plaintiff should show the defendant to be of age when he gave the note. Neither need the party to whom the promise is given appear, but may be supplied by

[1] Generally called Lord Tenterden's Act.

[2] And signature by an agent will not be sufficient; Hyde v. Johnson, 3 Scott, 289, 36 E. C. L. R.

[*80] *Another case is that of a promise to pay a debt barred by the Statute of Limitations; but, as I shall have occasion to speak again of that statute before the conclusion of the lecture, I shall reserve what I have to say regarding the writing by which its operation may be defeated.

Now these are the principal cases in which the law of England requires that particular contracts should be reduced to writing; not that they are the only ones, for there are many statutes making writing necessary

oral evidence. "The effective words," said Lord Denman, C. J., "in the Act are 'promise' and 'ratification.' The mischief to be provided against was not the want of particularity as to the sum, but looseness of proof as to the fact of acknowledgment." Coleridge, J., yielded to the authorities with great reluctance (Bird v. Gammon, 8 B. N. C. 883; and Dickenson v. Hatfield, 1 M. & Rob. 141, as to the sum, and Edmund v. Downes, 2 C. & M. 459, as to the date), and said it was "one of a class by which a statute had been frittered away, in order to comply with the ordinary habits of men. It is common to send letters in envelopes; the statute is therefore construed so as not to interfere with this custom."[1]

[1] In the very recent case of Harris v. Wall, 1 Exchq. 121, the letter of ratification was less strong than in Hartley v. Wharton, and it was said that Lord Tenterden's Act expressly made "a distinction between a new promise and the ratification, after majority, of the old promise made during infancy, in both cases requiring a written instrument signed by the party. The first step, therefore, to take towards a decision of this case, is to understand clearly what is meant by a ratification, as distinguished from a new promise. We are of opinion (apart from Lord Tenterden's Act), that any act or declaration which recognises the existence of the promise as binding, is a ratification of it, as, in the case of agency, anything which recognises as binding, an act done by an agent, or by a party who has acted as agent, is an adoption of it. Any written instrument signed by the party, which, in the case of adults, would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification."

It is believed that such a statute has not generally been enacted in this country.

in certain particular transactions, but these are the cases of most frequent occurrence, and therefore fittest to be here mentioned.

Having now, therefore, pointed out to you the practical distinction which exists between written *and verbal contracts, though both of them alike, [*81] if not sealed and delivered, rank but as *simple contracts* in the eye of the law, it is time to touch on some points which apply to all simple contracts alike; and the first and most important is, on the *consideration* by which they are supported.

I have already stated to you that one of the main distinctions between a contract by *deed* and a simple contract is, that *the latter requires a consideration to support it*, the former not. And here it is proper to observe, incidentally, that when I say that a contract by deed does not require a consideration to support it, I mean to say that it does not require a consideration for the purpose of binding the party who executes it, and rendering him liable. I do not, by any means, intend that you should understand that a consideration may not come to be a most important ingredient in a contract by deed,[1] as between parties claiming a benefit under that deed, and other parties having conflicting claims upon the person executing it. For instance, the statute of the 13th Eliz., c. 5, renders a great variety of deeds (if made without a valuable consideration) void as against creditors; and this statute (which Lord Mansfield has said is only declaratory of the Common Law) is founded on a perfectly righteous and equitable principle: for how absurd and unjust would it be to allow a man to defeat the claims of his real creditors by entering *into obligations to persons who had never parted with any value at all. When, [*82]

[1] See supra, note 1, to p. 13.

therefore, I say that a deed is good *without consideration*, I do not mean to say that it stands for all purposes on the same footing as an instrument for which value has passed; but what I mean that you should understand is this: that, where the interests of third parties are not affected, but the question is between the person who entered into the contract and the person with whom it is made, there a man cannot defend himself against a promise made by deed by saying that he received no consideration for it, although he might defend himself upon that ground against the very same promise if it had been made by simple contract. I cannot, I think, put a better example of this than that which I put in a former lecture: A. owes B. 50*l*. Now if I write upon a piece of paper as follows:

"I promise A. that I will discharge for him the debt due from him to B.,"

and give him the paper so written, here is a simple contract without any consideration for it; and, if I fail to perform the promise, no action will lie against me, because a simple contract, founded upon no consideration, cannot be enforced: and yet, if I had sealed that very slip of paper, and delivered it to A. as my act and deed, an action of covenant would have lain against me had I afterwards failed in performing it; and [*83] *to that action it would have been no defence to say that I received no consideration for my undertaking: I might say that I had been imposed upon, and persuaded to execute it by A.'s fraud, or I might say that the debt due to B. was an illegal one, and that my promise was made in pursuance of an illegal arrangement; but that the promise was without consideration would be a defence of which, the con-

tract being by a deed, I could not be allowed to avail myself.[1]

Here I am tempted to digress, for a moment or two, from the main course of the subject, for the imaginary case I have first put reminds me of a real and a very curious point which has been recently decided in the Court of the Queen's Bench. The case I put, you will observe, was this: A. owes B. 50*l*. I write and sign a sheet of paper in these words:

"I promise to A. to discharge *the debt due from him to* B."

Now this promise, if I have received no consideration for it, is, as I have said, merely void. But suppose I *have* received a consideration for it, will it be binding on me then? Suppose, for instance, A. has given me a horse or a diamond ring as a consideration for my undertaking the responsibility, can my promise be enforced even in that case? Now, at the first statement of the question, I dare say that you feel surprise that it ever should have been made a question at all; but a moment's reflection will suffice to show you why it not only was a question, but a very doubtful one. The fourth section of the Statute of Frauds, you will remember, among the five sorts of *agreement* which it directs should be evidenced by writing, comprehends *any promise to answer for the debt of another.* Now in the case I have been putting there is a debt due from A. to B., and my promise is a promise to A. to pay it; and though I have supposed the promise to be in writing, and signed, and to be

[*84]

[1] It has been before stated, that in some of the United States, the obligor of a specialty is, by statutory enactment, permitted, under some restrictions, to show its failure, as, at common law, he could its illegality of consideration.

founded upon a sufficient consideration—say the horse or the ring—still it is not such a writing as would satisfy the Statute of Frauds, for that writing, as I showed you, in a former lecture, from the authorities, must show the consideration as well as the promise; and in the case which I have put the writing simply contains a signed promise to A. to discharge his debt to B., but neither expressly nor impliedly mentions or alludes to any consideration at all. If, therefore, the case be within the Statute of Frauds, no action is maintainable upon that promise, although founded upon a good and valuable consideration; so that the question, you see, reduces itself simply to this point: Is such a promise, that is, is a promise to pay another man's debt, made, not to the person to whom it is due, but to the debtor himself, a promise to answer for the debt of another within the *meaning* of the fourth section of the Statute of Frauds?—I say within the *meaning*, *for that it comes within the *words*, literally understood, is obvious.

[*85]

It is a singular thing that this question never should have received a judicial decision until it came before the Court of Queen's Bench, a short time since, in the case of Eastwood v. Kenyon, which is now reported in 11 Ad. & Ell. 438, 39 E. C. L. R. In that case the plaintiff was liable to a Mr. Blackburne on a promissory note, and the defendant promised *the plaintiff* to discharge the note to Blackburne. The Court held that this was not to be a promise to answer for the debt of another within the meaning of the fourth section of the Statute of Frauds.

"If," said Lord Denman, "the promise had been made to Blackburne, doubtless the statute would have applied; it would then have been strictly a promise to answer for the debt of another: and the argument on the part of the defendant is, that it is not less the debt

of another because the promise is made to that other, viz., the debtor and not the creditor, the statute not having in terms stated to whom the promise contemplated by it is to be made. But, upon consideration, we are of opinion that the statute applies only *to promises made to the person to whom another is answerable.* We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute, which is now sought to be established, and which we think not to be the true one."[1]

To return to a subject from which I digressed for the purpose of mentioning this point, and the decision upon it. A simple contract is, as I have said, incapable of becoming the subject of an action, unless supported by a consideration. **Ex nudo pacto, non oritur actio,* is an old and well-established maxim of our law, [*86] as well as of the civil law, and has been illustrated by a great variety of cases, from time to time: thus it has been laid down by Lord Kenyon, in Harris v. Watson, Peake, 72, that a promise made by a captain of a ship to one of his seamen, when the ship was in extraordinary danger, to pay him an extra sum of money as an inducement to extra exertion, was a void promise, because every seaman is bound to exert himself to the utmost for the safety of the ship, and therefore the captain would get nothing from the seaman in exchange for his promise, except that which the seaman was bound to do before.[2]

[1] "The statute applies only," said Parke, B., in the recent case of Hargreaves v. Parsons, 13 Mees. & Wels. 569, "to promises made to the persons to whom another is already, or is to become answerable. It must be a promise to be answerable for a debt of, or a default in some duty by that other person *towards the promisee.* This was decided, and no doubt rightly, by the Court of Queen's Bench, in Eastwood v. Kenyon," and the same point had been previously decided by the Supreme Court of New York, in Johnson v. Gilbert, 4 Hill, 178.

[2] And to the same effect were Newman v. Walters, 3 Bos. & Pul. 612; Stilk v. Myrick, 2 Camp. 317; Smith v. Bartholomew, 1 Metcalf, 278.

The reason for the strictness with which this rule of law—that there must be a consideration to support a simple contract—is enforced, is to guard persons against the effects of their own improvidence in entering hastily and inconsiderately into engagements which may prove ruinous to them. The law does not absolutely prohibit them from contracting a gratuitous obligation, for they may, if they will, do so by deed; and it is thought that a deed being an instrument requiring somewhat more of ceremony and formality in its concoction, more opportunity for reflection is afforded to the party executing it than to a person entering into a simple contract, and, consequently, that it is not unreasonable to attribute to it a more stringent operation.

[*87] *The reason of the law of England on this point—one of the most important in our entire system—is exceedingly well explained in the judgment of the Court of Queen's Bench, in Eastwood v. Kenyon, the case which I before mentioned with reference to the fourth section of he Statute of Frauds.

"The L. C. J. remarks in that case that 'the eminent counsel who argued for the plaintiff in Lee v. Muggeridge, 5 Taunt. 36 (and who were the present Lord Wynford and Sergeant Lens), had spoken, in their argument, of Lord Mansfield as having considered the rule of *nudum pactum* too narrow; and maintained that all promises deliberately made ought to be binding at law, as they certainly are in honour and conscience. But,' his lordship continues, 'the enforcement of such promises at law, however plausibly recommended by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society, one of which would be the frequent preference of voluntary undertakings to claims for just debts.[1] Suits would thereby be multiplied, and voluntary undertakings would

[1] Thus services voluntarily done by one for another, without his privity or consent, afford no ground for an action, however meritorious they may be, as, for instance, in saving his property from fire; Bartholomew v. Jackson, 2 Johns. 38; or by doing additional work to a particular job. Hart v. Norton, 1 M'Cord, 22.

be also multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult."

Now, with regard to the question, *What does the law of England recognise as a consideration capable of supporting a simple contract?* the best and most practical answer is: *Any benefit to the person making the promise, or any loss, trouble, or inconvenience to, or charge upon, the person to whom it is made.* Sir Wm. Blackstone, indeed, in the 2d vol. of his Commentaries, 444, following the arrangement of the civilians, divides *Considerations into four classes: 1st, *Do ut des,* [*88] where I give something that something may be given to me; 2d, *Facio ut facias,* where I do something that something may be done for me; 3d, *Facio ut des,* where I do something that something may be given me; and 4th, *Do ut facias,* where I give something that something may be done for me. Divisions of this sort are useful for the sake of arranging our ideas, and testing their clearness; but the short practical rule is, as I have said, that *any benefit accruing to him who makes the promise, or any loss, trouble, or disadvantage undergone by, or charge imposed upon him to whom it is made,* is a sufficient consideration, in the eye of the law, to sustain an *assumpsit.*(a) Thus, let us suppose I pro-

(a) The consideration is the cause of the contract. Plowden, citing the civil law, gives this definition:—"Nudum pactum est ubi nulla subest *causa* præter conventionem; sed ubi subest causa fit obligatio et parit actionem." (Plowd. 309.) The Code Civil of France adopts the same expression:—"L'obligation sans *cause* ou sur une fausse *cause,* ou sur une cause illicite, ne peut avoir aucun effet." But this cause is not necessarily the same as the motive to a contract. J. A. Rogron, on the "Code Civil," well says,—"La cause de l'engagement d'une partie est le fait ou la promesse de l'autre partie; elle peut aussi consister dans une pure libéralité de la parte de l'une des

[*89] mise to *pay B. 50*l.* at Christmas. Now there must be a consideration to sustain this promise.

parties: ainsi, lorsque je m'oblige à payer mille francs à *Paul*, pour tels services que son père m'a rendus, la cause determinante du contrat, ce sont les services qui m'ont été rendus; le *motif* qui m'a porté à contracter, c'est le désir de m'acquitter envers lui des services de son père; si celui-ci ne m'a jamais rendu les services dont il a été parlé dans l'acte, le contrat est sans cause."

This doctrine is adopted and engrafted upon our law in the recent case of Thomas v. Thomas, 2 Q. B. 851, 42 E. C. L. R., where the distinction between cause and motive is well exemplified; and Lord Denman, C. J., interprets the word *cause*, in the passage referred to, as "one which confers what the law considers a benefit on the party." —Patteson, J., further remarks,—"Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff; it may be some benefit to the plaintiff, or some detriment to the defendant; but at all events, it must be moving from the plaintiff. Now that which is suggested here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff, it moves from the testator; therefore, legally speaking, it forms no part of the consideration." See also Lilly v. Hays, 5 Ad. & Ell. 548, 31 E. C. L. R.

The consideration must not only move from the plaintiff, but it must be such a one as he has the means of performing legally; 2 Wms. Saund. 137 *h*; and see post, Lect. VI. as to immoral and illegal considerations. Subject to these restrictions, says Selwyn's Nisi Prius, "any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or such inconvenience suffered by the plaintiff, with the consent, express or implied, of the defendant, or, in the language of the pleading, *at the special instance and request of the defendant.*"—1 Selwyn's N. P. "Assumpsit," p. 43.

This leads us to another element of contracts, of which it may not be useless to give some account here, inasmuch as it is involved in the subject of this and the following lecture.

Incidental to the relation between the parties to a contract arising from the nature of a consideration is their mutual assent to it.

"A contract," says Pothier, "includes a concurrence of intention in two parties, one of whom promises something to the other, who on

It may *be that B. has lent me 50*l.*: here is a consideration by way of advantage to me. It [*90]

his part accepts such promise." Hence is assent or acceptance indispensable to the validity of every contract; for "as I cannot," continues Pothier, "by the mere act of my own mind transfer to another a right in my goods, without a concurrent intention on his part to accept them, neither can I by my promise confer a right against my person until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right." (See Grotius, lib. ii. c. 2.) Wherever there is not an assent, express or implied, to the terms of the proposed contract by both parties, there is no mutuality, and no contract.

The editors of "Saunders" and Mr. Chitty are at issue on this point. Mr. Chitty says that "every agreement ought to be so certain and complete, that *each party may have an action upon it*, in regard to matters to be performed for his benefit by the other contracting party;" and "that if the one party never were bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality." (Chit. Contr. 15.) This is denounced in 2 Wms. Saund. 186 (*i*), as "stated too broadly, and must be confined, it should seem, to those cases where the want of mutuality would leave one party without a valid consideration for his promise." This suggestion is founded on a remark by Tindal, C. J., in Arnold v. The Mayor of Poole, 4 M. & Gr. 896, 43 E. C. L. R.; that case, however, referred to peculiar rights of suit by and against a corporation. It is difficult to conceive a case where there should be a valid consideration on both sides, and yet a want of mutuality. The note goes on to state that "there are many cases of contracts not mutually binding at the time when made; as where A. says to B., 'If you will furnish goods to C., I will guarantee the payment;' there B. is not bound to furnish them; yet if he does, he may sue on the guarantee." (Morton v. Burn, 7 Ad. & Ell. 19, 23, 34 E. C. L. R.; Kennaway v. Treleaven, 5 M. & W. 498, 501.) "So a contract signed by the defendant only, and not by the plaintiff, has been allowed to be enforced by action, notwithstanding the objection of a want of mutuality." (Laythoarp v. Bryant, 2 B. N. C. 735, 29 E. C. L. R.) It is submitted that there was no want of mutuality in these cases. The judgment in Laythoarp v. Bryant went entirely on the point that it was not necessary that both parties should sign a note of the contract under the Statute of Frauds; it is expressly stated that "the *agreement* in

[*91] may be *that he has performed or has agreed to perform some laborious service for me; if so,

truth is made before any signature;" and the agreement was mutual. In Morton v. Burn it is expressly said in the judgment, "there is sufficient mutuality." Kennaway v. Treleavan is one of the many cases of a *conditional* contract,—of an inchoate guarantee—not binding nor intended to be binding when made, but to take effect subject to a stated contingency: the terms of it were, "I agree to be security for T. C. for whatever, *while he is in your employ*, you may trust him with." It was held in the judgment, that the consideration for the promise was the employment of T. C., and that the guarantee attached as soon as the employment began. If so, the mutuality and implied assent were complete. It is true, however, that no action could have accrued to the guarantor upon this agreement, and therefore is it that the test of mutuality, as laid down by Mr. Chitty, is too large; for there are binding contracts which from their nature neither bind nor admit of any breach by one of the parties, but to which assent is nevertheless a requisite; for in the case just put, had the party who received the guarantee failed to employ T. C. and accept the guarantee, he could not have enforced the promise of the guarantor, and there would have been *no contract.*

It is humbly submitted that the law lies between the two extremes of opinion held by Mr. Chitty on the one side, and the note to "Saunders" on the other: and is thus tersely stated by Tindal, C. J., in Jackson v. Galloway, 5 B. N. C. 75, 35 E. C. L. R.:—"*Every contract consists of a request on one side, and an assent on the other.*" These are the terms of mutuality: if either are absent, there is no contract.

The request may be either express or implied, and likewise the promise or assent. Both are far oftener implied than expressed in simple contracts. The cases in which the request or the promise are express require little comment. The ordinary meaning of the words used will determine the legal effect, according to the established rules of construction.

The assent to a contract must be to the precise terms offered. Where one party proposes a certain bargain, and the other agrees, subject to some modification or condition, there is no mutuality of contract until there has been an express assent to it so modified; otherwise it would not be obligatory on both parties, and would therefore be void. See instances of contracts defective on this ground in the cases of Jordan v. Norton, 4 M. & W. 155; Cook v.

here is a *consideration by way of inconvenience to him, and of advantage to me at the [*92]

Oxley, 3 T. R. 653, where a distinction is taken between a mere proposal and an agreement to sell. (See also Adams v. Lindsell, 1 B. & Ald. 681.) The case of Routledge v. Grant, 4 Bing. 660, 15 E. C. L. R., is also a good example of this principle. Grant offered to purchase Routledge's house, requiring possession on the 25th of July, and a definite answer in six weeks; Routledge accepted the offer, with possession on the 1st of August; Grant afterwards, within the six weeks, retracted his offer, and it was held that he had a right to do so.

The party who made the offer has a right to say, "*Non in hæc fœdera veni;*" and decline any other bargain than that which he offered. Where an offer is accepted in the terms in which it was made, and within a specified period—or if none be specified, then within a reasonable time—the contract is binding on both parties. At any time before it is accepted the offer may be rescinded; but not afterwards. A familiar illustration of the doctrine of assent is afforded by the recent letters allotting railway scrip. Many of these letters were in reply to a simple request for shares, and after complying with this request, they went on to stipulate that the *allotment should be void* unless the deposit money were paid at a certain specified place within a specified time. Thus the allottee offered to buy and to pay for his shares; but the allotters added the provision that the shares should be void in default of a mode of payment prescribed by themselves; whereas without such stipulation mere default of payment would not have voided the contract: to this additional stipulation there was often no assent, and the contract was therefore null and void, and no such allottee could have been sued upon the transaction, for the stipulation was clearly not implied in the agreement to take the shares. Pothier says, "the allowance of a certain time for paying money due, the liberty of paying it by instalments, &c., and the like, are *accidental to the contract*, because they are not included in it without being particularly expressed." 1 Evans's Pothier, 7. And expressed assent is obviously requisite, for as its subject-matter is not implied in the primary contract, neither is the assent to it.

Where a request is not expressed it is often implied from the circumstances of the transaction. Thus, wherever one party derives benefit from a consideration, it is equivalent to and implies a request on his part: the acceptance of goods or money lent, for instance, is

[*93] same time. It *may be that he is to labour for a third person at my request; here will be in-

an assent from which the law implies a request. Where the consideration is already performed before a promise is given, the previous request becomes of more importance, and must be proved, except where the law implies it from the nature of the contract; but this subject is amply discussed in the next lecture, where the cases are cited. Where there is an actual acceptance of the subject-matter of the contract, the assent is complete without proof of the request. There are various ways in which the mutual assent of both parties to a contract may arise by reciprocal request, performance, promise, and acceptance, but the test in all cases seems to be, in the first place, whether the assent be mutual.

The law implies a promise in like manner with requests where the promise is of the nature of the contract. Thus, where goods are sold, it implies a promise to pay for them: where they are lent, it implies a promise to take care of, and to return them: where hired, to avoid negligence of them, and to pay the hire. Certain promises are implied from the peculiar functions with which a man is invested. An executor, for instance, impliedly promises to pay the expenses of the testator's funeral. The distinction between implied and express promises is seen in such an agreement as waives or modifies the promise which the law would otherwise import into the contract; as for instance, that the borrower shall not be answerable for the loss of the thing borrowed; this is an express promise waiving the implied promise, for *expressum facit cessare tacitum.* Implied promises arise also from custom, and from the established and known mode of dealing in vogue between the parties. (See More v. Houghton, 1 Stark. 487, 2 E. C. L. R.; Stewart v. Aberdeen, 4 M. & W. 211; Roberts v. Havelock, 3 B. & Ad. 404, 23 E. C. L. R.) Assent is sometimes implied from the absence of dissent, where a person knowingly permits services to be rendered for him, or those in whom he is interested, without objecting: in some of these cases the law infers a previous request from the subsequent assent. (See the next Lecture, p. 111.)

Pothier enumerates another class under the title of *quasi* contracts, which he defines as "acts of a person permitted by the law which obliges him in favour of another, *without any agreement intervening between them;*" and one of the instances he gives is that of an heir's acceptance of a succession, which obliges him to the payment of the legacies "without the intervention of any agreement." This seems

convenience to him *without advantage to me: or it may be that he has become surety for some [*94] one at my request; *here is a charge imposed upon him. Any of these will be a good con- [*95] sideration to sustain the promise on my part. That this is the true rule of the law of England, you may collect from various instances, among which I will refer you to Williamson v. Clement, 1 Taunt. 523; the judgment of the L. C. J. in Willatts v. Kennedy, 8 Bing. 8, 21 E. C. L. R.; and the observations of Lord Ellenborough in Bunn v. Guy, 4 East, 194.

Provided there be some *benefit* to the contractor, or some *loss*, *trouble*, *inconvenience*, or *charge* imposed upon the contractor so as to constitute a *consideration*, the Courts are not willing to enter into the question whether that *consideration be *adequate* in value to the thing which is promised in exchange for it.[1] [*96]

to be a somewhat doubtful distinction: there *is* an agreement; namely, the implied one attaching to the acceptance of any station or emolument, to discharge the duties and claims which belong to it. There is doubtless a legal obligation; but there is not less on that account an implied promise to perform it. The cases in which actions for *tort* and *assumpsit* are concurrent remedies involve both legal obligations and implied promises. In these cases, where the default is tortious (as where a man hires a horse, and negligently injures him), the promise flows from the obligation; in the case of contracts, the obligation flows from the promise. The implied promise, as well as the obligation exist in both cases; and an action lies in both on *the breach of promise;* but it lies for the *breach of obligation* only in the former case; and this appears to be the main practical distinction between them.

[1] Hubbard v. Coolidge, 1 Metcalf, 93; Osgood v. Franklin, 2 Johns. Ch. 23, S. C. 14 Johns. 527; Bedel v. Loomis, 11 New Hamp. 9. "If a contract is deliberately made without fraud," said Wilde, J., in Train v. Gold, 5 Pick. 384, "and with a full knowledge of all the circumstances, the least consideration will be sufficient."

Very gross inadequacy, indeed, would be an index of fraud, and might afford evidence of the existence of fraud; and fraud, as I have already stated to you, is a ground on which the performance of any contract may be resisted. But, if there be no suggestion that the party promising has been defrauded or deceived, the Court will not hold the promise invalid upon the ground of mere *inadequacy;* for it is obvious that to do so would be to exercise a sort of tyranny over the transactions of parties who have a right to fix their own value upon their own labour and exertions, and would be prevented from doing so were they subject to a legal scrutiny on each occasion on the question whether the bargain had been such as a prudent man would have entered into. Suppose, for instance, I think fit to give 1000*l.* for a picture not worth 50*l.*: it is foolish on my part; but if the owner do not take me in, no *injury* is done. I *may* have my reasons. Possibly I may think that I am a better judge of painting than my neighbours, and that I have detected in it the touch of Raphael or Correggio. It would be hard to prevent me from buying it, and hard to prevent my neighbour from making the best of his property, provided he do not take me in by telling me a false story about it. Accordingly, in the absence of fraud, mere inadequacy of consideration is no ground for avoiding a *contract. You will see two remarkable instances of this in the late cases of Bainbridge v. Firmston,(*a*) 1 Perr. & Dav. 2, and Wilkinson v. Olivièra, 1 Bing. N. C. 490, 27 E. C. L. R., in which the defendant promised to give the plaintiff 1000*l.* for the use of a letter which contained matters explanatory of a controversy in which he was engaged,

[*97]

(*a*) 10 Ad. & Ell. 309.

and the consideration was held not to be inadequate to support the promise.(*a*)

There is an old case upon this subject involving so singular a state of facts that I cannot forbear mentioning it. It is called Thornborow v. Whiteacre, and is reported 2 Ld. Raym. 1164.

It was an action in which the plaintiff declared that the defendant, in consideration of 2*s.* 6*d.* paid down, and 4*l.* 17*s.* 6*d.* to be paid on the performance of the agreement, promised *to give the plaintiff 2 grains of rye corn on Monday the 29th of March, [*98] 4 on the next Monday, 8 on the next, 16 on the next, 32 on the next, 64 on the next, 128 on the next, and so on for a year, doubling, on every successive Monday, the quantity delivered on the last Monday.

The defendant demurred to the declaration, and, upon calculation, it was found that, supposing the contract to have been performed, the whole quantity of rye to be delivered would be 524,288,000 quarters, so that, as Salkeld, the reporter, who argued the demurrer, remarked, all the rye grown in the world would not come to so much. But the Court said that, though the con-

(*a*) The consideration must nevertheless be of some value in contemplation of the law; for instance, if a man make an estate at will in favour of another, this is an insufficient consideration, for he may immediately determine his will (1 Roll. Abr. 23, pl. 29); neither is the termination of disputes about debts an adequate consideration, for there may be no debt actually due (Edwards v. Baugh, 11 M. & W. 641). Mere moral considerations, and cases such as Harris v. Watson, already cited (p. 86), are also insufficient. (See also Clutterbuck v. Coffin, 3 M. & Gr. 842, and England v. Davidson, 11 A. & E. 856, 39 E. C. L. R.) But the consideration need not be *co-extensive* with an *express* promise, as we have seen (p. 54, n. ante, and Raikes v. Todd, 8 Ad. & Ell. 846, 35 E. C. L. R.); though, where the promise is *implied*, it is co-extensive with the consideration from which it flows; Roscorla v. Thomas, 3 Q. B. 236, 43 E. C. L. R., per Lord Denman, C. J., and see post, p. 114, n.

tract was a foolish one, it would hold at law, and that the defendant ought to pay something for his folly.[1] The case was ultimately compromised. I presume, however, that if, instead of demurring, the defendant had pleaded that he had been induced to enter into the contract by fraud, he would have been able to sustain his plea: since it seems obvious, on the face of the thing, that the plaintiff was a good arithmetician, who, by a sort of catch, took in a man unable to reckon so well. Probably the plaintiff had taken his hint from the old story regarding the invention of the game of chess. But, by demurring, the defendant admitted that there was no fraud, and, consequently, the only question was on the validity of the contract in the absence of fraud, so that the case presents a strong example of

[*99] *the reluctance of the Courts to enter into a question as to the adequacy of consideration. This reluctance is also very strongly exemplified by some late cases turning on contracts in restraint of trade. By the law of England a contract in general restraint of trade is void; but if in partial restraint of trade only, it may be supported, provided the restraint be reasonable, and the contract founded on a consideration. And it was once laid down that the consideration must be *adequate*, and that the Court would enter into the question of adequacy. However, they have lately decided that they will not do so. These cases are particularly strong, for they are cases in which, contrary to the general rule of law, a consideration is required, even though the contract be by deed. I shall

[1] So, in the old case in which the horse was sold for one barleycorn for the first nail in the horse's shoe, two for the second, and so on, doubling on each nail, the jury found, under the direction of the Court, for £8, the value of the horse; James v. Morgan, 1 Lev. 111.

have occasion to mention them again in a subsequent lecture.[1] At present I will only say that the recent decisions to which I refer are Hitchcock v. Coker, 6 Ad. & Ell. 439, 33 E. C. L. R.;(*a*) Archer v. Marsh, 6 A. & E. 966, and Leighton v. Wales, 5 M. & W. 551.

I think that I have now sufficiently explained what it is that the law recognises as a consideration sufficient to support a promise without deed. I must not, however, conclude without noticing one class of cases which form a species of exception to the rule that a simple contract requires a consideration to support it. I allude *to the case of a negotiable security, a bill of exchange or promissory note. These, not being [*100] under seal, are simple contracts; but there is this marked distinction between the situation in which they, and that in which any other simple contract stands, namely, that they are always presumed to have been given for a good and sufficient consideration, until the contrary is shown. And even if the contrary *be* shown, still, if the holder for the time being have given value for the instrument, his right to sue on it cannot be taken away by showing that the person to whom it was originally given could not have sued, unless indeed it be further shown that he had *notice* of the circumstances, or that he took the security when over-due, which is a sort of constructive notice, and places him in the same situation as the party from whom he took it. But so long as nothing of that sort appears, every note and acceptance is *primâ facie* taken to have been given for good consideration, and every endorsement to have been made on good consideration. See the cases collected Byles on Bills, last ed. p. 72.

(*a*) Confirmed by Proctor v. Sargent, 2 M. & Gr. 20, 40 E. C. L. R., and Green v. Price, 13 M. & W. 698, per Parke, P.

[1] See infra, page 126.

[*101] *LECTURE V.

CONSIDERATION OF SIMPLE CONTRACTS — EXECUTED CONSIDERATIONS — WHERE EXPRESS REQUESTS AND PROMISES ARE OF AVAIL — MORAL CONSIDERATIONS — ILLEGAL CONTRACTS — RESTRAINTS OF TRADE.

I ENDEAVOURED to explain in the last lecture what it is that the law of England recognises as a consideration sufficient to support a promise without deed. I stated that any benefit to the person who makes the promise, or any loss, trouble, or disadvantage undergone by, or charge imposed upon the person to whom it is made, will satisfy the rule of law in this respect. In order to render this as clear as possible, I am about, before proceeding to the next branch of the subject, to illustrate it by mentioning one or two decided cases, in which certain considerations have been held sufficient to support the promises founded on them.

It has been frequently decided that, if one man have a legal or an equitable right of suit against another, his forbearance to enforce that legal or equitable right of suit, is a sufficient consideration for a promise either by the person liable to him, or any third person, either to satisfy the claim on which that right of suit is founded, or to do some other and collateral act. Thus, in the case of Morton v. Burn, 7 Ad. & Ell. 19, 34 E. C. L. R.; the *plaintiff, in an action of *assumpsit*, [*102] stated in his declaration that he was the assignee of a bond for 728*l.* 2*s.* 6*d.*, in which the defendant was the obligor, and that, in consideration that the plaintiff would receive payment on certain specified days, and forbear proceeding in the meanwhile, the defendant had promised to pay on those days. After a

verdict for the plaintiff, it was objected, in arrest of judgment, that there was no consideration for the promise; for that, if an action had been brought in the name of the obligee of the bond, the agreement of the assignee to forbear, would have been no defence (upon a ground which I have already sufficiently explained, namely, that an obligation by deed cannot be discharged by an agreement without deed). The Court, however, decided that the consideration was sufficient; "for" (said the Lord Chief Justice), "although the agreement to forbear would not be pleadable to an action in the name of the obligee, yet, unless the plaintiff *did* forbear according to his agreement, he would not be able to sue on the defendant's promise." Thus again in Willats v. Kennedy, 8 Bing. 5, 21 E. C. L. R., the plaintiff, who had been appointed by the Court of Chancery a receiver of the debts and moneys of a firm, agreed to give time of payment to a person who owed money to the firm, in consideration of which a third person promised to guarantee the debt. So, in an action against that third person, it was objected *that there was no sufficient consideration for his promise; [*103] the Court of Common Pleas, however, decided that there was so. Upon the effect of *forbearance* as a consideration, you may see further Parker v. Leigh, 2 Stark. 229,[1] 3 E. C. L. R.; Atkinson v. Bayntun, 1 Bing. N. C. 444, 27 E. C. L. R., and Smith v. Algar, 1 B. & Ad. 603, 20 E. C. L. R., which is an exceedingly strong case. In that case the plaintiff had obtained judgment against Elizabeth Mackenzie for 57*l.* debt, and 65 shillings costs; and in consideration that the plaintiff would forbear to execute a *fieri facias* on her goods, the defendant undertook to pay him 107*l.* in three days. It was objected that there was no con-

[1] And see, also, the notes to Forth v. Stanton, 1 Saunders, 210.

sideration, or, at least, no sufficient consideration; but Lord Tenterden said, "It is true the plaintiff might not perhaps have been entitled to recover to the full extent of 107*l.*, though it is to be observed, he might have levied the costs of the execution in addition to the sum given by the verdict. But he had a right at least to levy 60*l.*, and if, in consideration of his forbearing that, the defendant promised to pay him the larger sum; if the inconvenience of an execution against these goods at the time in question was so great, that the defendant thought proper to buy it off at such an expense, I do not see that the consideration is insufficient for the promise."(*a*)

(*a*) The forbearance to prosecute an action is not a valid consideration for a promise to pay a sum of money to the plaintiff, unless there be a good cause of action. This point has been very recently determined in the case of Wade v. Simeon, 15 Law Journ. C. P. 114; since reported, 1 Com. Bench, 610, 50 E. C. L. R., where issue had been joined in a previous action for the recovery of a sum of money from the defendant, who had there promised to pay the money and costs, in consideration that the plaintiff would forbear further proceedings. An action having been brought upon this promise, the defendant pleaded that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the said action. "To that," said Tindal, C. J., in giving judgment, "the plaintiff has demurred, and, doing so, admits the statement contained in it, that he had no cause of action in the original suit, to be true. Having made that admission, it appears to me that he is estopped from saying that there was any valid consideration for the defendant to promise. It is almost *contra bonos mores*, and certainly against all legal principle, that when a man knows that he has no cause for it, he should still persist in prosecuting an action. Then, in order to establish a binding promise, the plaintiff must show a consideration for it, consisting of something which is either beneficial to the defendant, or detrimental to the plaintiff. It cannot, however, be said that the foregoing of such an action can be regarded by a Court as beneficial to the defendant, because he thereby saves the risk of defeat, and the extra costs which he would necessarily incur in his defence, for we must assume that the result of the action would have been in his

*Again, it has been decided that if I *intrust* a man to do some act for me, although I am to [*104]

favour, and the law would enable him to recover costs, which it regards as a compensation for all the costs the defendant sustains. Neither can the foregoing of the action be regarded as detrimental to the plaintiff, for we can only view it as saving him from the payment of those costs. The consideration, therefore, fails upon both grounds."

On the same principle, the mere fact that disputes and controversies are pending between two persons is no sufficient consideration for a promise to pay money, unless it appear that something was really due, or that the accounts were open or unsettled, the amount due being alone in doubt, to settle which the promise was given: for the withdrawal of a *bona fide* claim, though unascertained in amount, would be a valid consideration; Edwards v. Baugh, 11 M. & W. 641, and Lewellyn v. Lewellyn, 14 Law Jour. Q. B. 4, per Coleridge, J. And where a man who has a judgment debt takes from his debtor a promissory note for the amount, payable at a certain time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that period, and if so, that is a good consideration for the giving of the note. Baker v. Walker, 14 M. & W. 468.[1]

[1] The above note states correctly the course of decision observed by the courts of common law in England, and in a recent case, Kaye v. Dutton, 7 Man. & Gr. 807, 49 E. C. L. R., the Court of Common Pleas went a step further, by holding that an actual release was an insufficient consideration where there was no interest on which the release could operate. But since at least the time of Lord Macclesfield, courts of equity, in a train of decisions following the case of Stapilton v. Stapilton, 1 Atkins, 2, have done all in their power to sustain *family* arrangements and compromises, and decreed performance of the instruments springing from them, "albeit, perhaps," said the present Chancellor, "resting upon grounds which would not have been considered satisfactory if the transaction had been between mere strangers," per Sugden, Ch., in Westby v. Westby, 2 Drury & Warren, 503. Even, however, when such has been the case, it seems to have been held that if a person deliberately enter into an agreement for the purpose of compromising a claim made *bona fide*, and of whose nature and extent there is no such concealment or misrepresentation on the other side, as would, upon these grounds, vitiate the transaction, such a compromise is a sufficient consideration for the

[*105] *pay him nothing for performing it, still the mere *trust* which I repose in him is a considera-

agreement, and it will be enforced in equity if not at law; Attwood v. ——, 1 Russell, 353; Pickering v. Pickering, 2 Beavan, 56; Bailey v. Wilson, 1 Dev. & Bat. Ch. 182; Moore v. Fitzwater, 2 Rand. 442; nor will the court inquire into the adequacy of the consideration, for, as Sir John Leach has well observed, "if a court is, in such case, to be governed by its judicial opinion upon the rights of the parties, then to him who, by that opinion, is held to be entitled to the whole property, no consideration can be really adequate which is less than the whole, and no compromise can ever bind the successful claimant;" Naylor v. Winch, 1 Sim. & Stu. 565. These equitable principles have, on this side of the Atlantic, been very generally applied in common law courts, and the compromise of a doubtful claim is deemed not only a sufficient consideration to support a promise, but is highly favoured; Perkins v. Gay, 3 Serg. & Rawle, 327; Barlow v. Ocean Ins. Co., 4 Metcalf, 270; Tuttle v. Tuttle, 12 Id. 537; Stoddard v. Mix, 14 Connect. 12; Fisher v. May, 2 Bibb, 488; and there would seem to be little doubt, that where such a compromise has been effected by the doing *of any act*, such as discontinuing a suit, releasing a lien, or the like, a sufficient consideration is thus formed, although the ground of the consideration may have been without foundation, and thus arises a distinction between a mere *forbearance* to sue, where the agreement is entirely executory, and a *compromise* of a demand, resulting in something being actually done. Thus in O'Keeson v. Barclay, 2 Pennsylv. 531, a slander suit, in which the words laid were not actionable, was compromised by the giving a note for $100, and the judgment of the court below ordering a verdict for the defendant in an action brought on that note, was reversed by the Supreme Court. So, in Holcombe v. Stimpson, 8 Vermont, 141, where the maker of a note offered to prove that it was given in compromise of a prosecution for bastardy, and that he was absent from the country for a time far beyond the ordinary term of gestation, it was held that there being no evidence of fraud or imposition, the evidence was rightly excluded. On the other hand, in Cabot v. Haskins, 3 Pick. 83, where one supposing himself liable to the United States, when by law he was not, promised to assume a certain liability, the other party promising to pay him a certain sum therefor, it was held that the danger, being a mere ideal one, could not form the substratum of a promise, and the distinction here adverted to, was expressly taken by the court in Stoddard

tion for a promise on his part to conduct himself faithfully in the performance of it. (See Whitehead v. Greetham, 2 Bing. 464, 9 E. C. L. R.; Shillibeer v. Glynn, 2 M. & W. 143.) Nay, so far do the cases on this subject go, that it is settled that not only is the reposal of such trust a sufficient consideration for an express promise on the part of the person in whom it is reposed to conduct himself faithfully in the performance of it, but the law, even in the absence of an express promise, implies one that he will not be guilty of gross negligence. This was the point decided in the famous case of Coggs v. Bernard, 2 Ld. Raym. 909.[1] And on this point of the law it is that the celebrated distinction occurs between remunerated and unremunerated *agents; from the former of whom the [*106] law implies a promise that they will act with reasonable diligence; from the latter, only that they will not be guilty of gross negligence. (See Beauchamp v. Powley, 1 M. & Rob. 38; Doorman v. Jenkins, 2 Ad. & Ell. 256, 29 E. C. L. R.; Dartnal v. Howard, 4 B. & C. 345, 10 E. C. L. R.) And the other equally remarkable distinction, namely, that a remunerated agent may be compelled to enter upon the performance of his trust, or at least made liable in damages if he neglect to do so, whereas an unremunerated agent cannot, although, as we have seen, he *may* be liable for misconduct in the performance of it. (See Elsee v. Gateward, 5 T. R. 143.)

Again, if one man is compelled to do that which another man ought to have done, and was compellable

v. Mix, supra, as it was in Edwards v. Baugh, 11 Mees. & Welsby, 641. See a note upon this subject to the case of Stapilton v. Stapilton, 2 White's Eq. Cas., Part 2, p. 265.

[1] The student may be referred to an able note to this case, in 1 Smith's Leading Cases, 244, 4th Am. ed.

to do, that is a sufficient consideration to support a promise by the former to indemnify him. Such is the common case of a surety, who has been compelled to pay a demand made against the principal, and who, as we know, is entitled to bring an action of *assumpsit* to recover an indemnity. (See Toussaint v. Martinnant, 2 T. R. 100; Fisher v. Fellowes, 5 Esp. 171; and see Prior v. Hembrow, 8 Mee. & W. 873, and Jeffreys v. Gurr, 2 B. & Ad. 833, 22 E. C. L. R.)

I might cite a multitude of other cases in which questions have arisen as to the sufficiency of the consideration; but I think that the instances I have already given are sufficient for the purpose I had in [*107] view, which was, to illustrate *the general nature of the questions which arise on the sufficiency of a *consideration* to support a promise.

There is, however, one thing more to be observed, and that is, that the law recognises a distinction between what are called *executed* and *executory* considerations. Now with regard to the meaning of these words, which you will continually hear used in legal arguments, it is simply this:—*an executed consideration is something that has already taken place*, an *executory consideration* something *that is to take place*,—one is *past*, the other *future*. Thus, if A. delivered goods to B. yesterday, and B. makes a promise to-day in consideration of that delivery, this promise is said to be founded upon an *executed* consideration, because the delivery of the goods is past and over. But if it be agreed that A. *shall* deliver goods to B. to-morrow, and that B. shall, in consideration, do something for A., here is an *executory consideration*, because the delivery of the goods has not yet taken place. And so, whenever, at the time of making a promise, the consideration on which it is founded is *past*, the consideration is

said to be *executed;* whenever the consideration is future, it is said to be *executory.*[1]

Now, between *executed* and *executory*, or, to speak plain English, between *past* and *future* considerations, the law makes this distinction, namely, that an *exe-*

[1] There are also said to be two other kinds of consideration, viz., concurrent and continuing. The former arises in the case of mutual promises; as where A. and B. being competitors for the bounty for the best manufactured cloth, agreed that the successful competitor should divide the bounty with the other, the promises were mutual, and in consideration of each other; Briggs v. Tilloton, 8 Johns. 306. So where several promise to contribute to a common object; Stewart v. Trustees of Hamilton College, 2 Denio, 403; Society of Troy v. Perry, 6 New Hamp. 164; where one promises to become a partner, and the other promises to receive him as such; M'Neil v. Reid, 9 Bingham, 68, 23 E. C. L. R. and the like; Wood v. Rice, 4 Metcalf, 481; Wightman v. Coates, 15 Mass. 1; Willard v. Stone, 7 Cowen, 22. In cases of concurrent considerations, if the promise of either party should fail to bind him (as from illegality of subject-matter, or any such cause), the other promise would be deprived of its support, and the contract could not be enforced. It is also necessary that the promises should be mutual and simultaneous, Thornton v. Jenyns, 1 Scott, 74; and an averment, that in consideration of the plaintiff's promise, the defendant "*afterwards*, to wit, *on the same day* promised," has been held bad, the promise having no consideration; that is, no consideration but another promise, and that promise was not a mutual and simultaneous one; Livingston v. Rogers, 1 Caines, 583; Fricke v. Wood, 12 Johns. 190; Keep v. Goodrich, Id. 397.

It has been sometimes said, that a *continuing* consideration is sufficient to support a promise, as where one should promise in consideration of what the other party had done and might thereafter do. But, in reality, it is the executory part of the consideration which is alone valuable, and is sufficient to support the whole promise; and such, upon examination, will, it is believed, be found to be the true ground of decision of the cases; Pearle v. Unge, Cro. Eliz. 94; Brett v. J. S., Cro. Eliz. 735; Colton v. Westcott, 1 Rolle, 381; Loomis v. Newhall, 15 Pick. 159; Andrews v. Ives, 3 Connect. 368.

[*108] *cuted* consideration must be founded *on a previous request; an *executory* one need not, for, in fact, its very terms imply a request. For instance, in the case of Hunt v. Bate, Dyer, 272, Bate's servant was arrested and sent to prison, and Hunt became bail for him, and procured his liberation, after which the master promised Hunt to save him harmless. Hunt was obliged to pay the servant's debt, and brought an action against Bate upon his promise to indemnify him; but the Court held that it would not lie. "For," said the Judges, "the master did never make *request* to the plaintiff to do so much, but he did it of his own head." But, the report goes on to say, "in another action brought on a promise of twenty pounds made to the plaintiff by the defendant, in consideration that the plaintiff," *at the special instance of the defendant*, had taken to wife the cousin of the defendant, that was a "good cause of action, though the marriage was *executed* and *past* before the undertaking and promise, because the marriage ensued at the *request* of the defendant."[1]

[1] A very good illustration of this principle may be found in the recent case of Dearborn v. Bowman, 3 Metcalf, 155, where the plaintiff had in a political campaign rendered services in the circulation of pamphlets to aid the election of the defendant, who had subsequently promised to pay him therefor, and the Court, in holding the promise to be destitute of consideration, said, "such services impose no obligation, legal or moral, on the defendant, and it would be somewhat dangerous to hold that they created any honorary objection on him to pay for them. Nor would it be aided in a legal view by a previous custom, if proved, for candidates to contribute to the payment of similar expenses, whether successful or otherwise in the election. Nor were these services performed at the request of the defendant. On the contrary, it appeared by the evidence, that they were performed by the chairman of the county committee, who alone was responsible for the payment, and between whom and the defendant there was no privity, nor even any communication until

These two cases clearly illustrate the distinction between an *executed*, i. e. a *past* consideration, *moved*, as we call it, by a previous request, which will support a promise, and an executed consideration *not* moved by a previous request, which will not support a promise. You will find the same distinction clearly explained in *Lampleigh v. Braithwaite, Hob. 712, and the judgment in Eastwood v. Kenyon, 11 A. & E. [*109] 438, 39 E. C. L. R.[1]

But here arises another distinction, and it is the last to which I shall refer upon this, I must admit, somewhat complex subject, and which I am therefore desirous of treating in a manner as little complex as possible: but this is a distinction to which it is absolutely necessary to refer, in order that you may not be misled by what I have already stated. There being the rule I have just stated regarding *executed considerations*,

long after the services had been performed. The rule of law seems to be now well settled, though it may have been formerly left in doubt, that the past performance of services constitutes no consideration even for an express promise, unless they were performed at the express or implied request of the defendant, or unless they were done in performance of some duty or obligation resting on the defendant; Mills v. Wyman, 3 Pick. 207; Loomis v. Newhall, 15 Pick. 159; Dodge v. Adams, 19 Pick. 429. As the services performed by the plaintiff were not done at the request of the defendant, as they were not done in the fulfilment of any duty or obligation resting on him, there was no consideration to convert the express promise of the defendant into a legal obligation." To the same point are Snevely v. Reed, 9 Watts, 396; Geer v. Archer, 2 Barbour, 420; Hudson v. Overtuff, 1 Scammon, 170; Kinnerly v. Martin, 8 Missouri, 698; Beaumont v. Reeve, 8 Queen's Bench, 483, 55 E. C. L. R.

[1] The student who seeks for a more extended analysis of this subject than can be afforded in these elementary lectures, may most profitably refer to the note to Lampleigh v. Braithwaite, 1 Smith's Lead. Cases, 195, 4th Amer. ed., and that to Vadakin v. Soper, 1 Amer. Lead. Cases, 120.

namely, that an *executed consideration* must have arisen from a previous request by the person promising, in order that it may be sufficient to support the *promise*, there are certain classes of cases in which this *previous request* is *implied*, and need not be expressly proved by the person to whom the promise is given. Now the cases in which a previous request is implied are as follow:—

First, the case which I have already stated, *in which one man is compelled to do that which another ought to have done, and was compellable to do.* In this case the consideration is an *executed* one, for the thing must have been *done* before any promise can be made to reimburse the person who has done it; but though the consideration is *executed, the law implies the request.* And therefore in this case an action may be brought for indemnity without proving any express request on the part of the defendant. See *Jeffreys v. [*110] Gurr, 2 B. & Ad. 833, 22 E. C. L. R.; Pownall v. Ferrand, 6 B. & C. 439, 13 E. C. L. R.; Exall v. Partridge, 8 B. & C. 308, 17 E. C. L. R.; Grissell v. Robinson, 3 Bing. N. C. 13, 32 E. C. L. R.(*a*)

I must further observe upon this class of cases, that not only is the request implied, but the *promise* also; for if, to put an example, A. is indebted to B. in a certain sum of money, and C. is his surety; if C. be com-

(*a*) In these cases, "The plaintiff must prove either that the money was paid by *compulsion of law* for the benefit of the defendant, or at his express request; and in order to show payment by compulsion of law, he must show such a contract as the law will enforce;" Pawle v. Gunn, 4 B. N. C. 448, 33 E. C. L. R., per Tindal, C. J. See also, as to payments of this nature, Davies v. Humphreys, 6 M. & W. 153, and Pitt v. Purssord, 8 M. & W. 538, which decide that where there are co-sureties, any one who is compelled to pay may bring an action against his co-sureties for contribution, without showing that he paid by compulsion.

pelled to pay, not only is a request by A. to do so implied by law, but a promise by him to indemnify C. is also implied. And, in an action brought by C. to enforce the indemnity, he need prove no express promise, no express request, but simply that A. was indebted to B., and that he, C., as A.'s surety, was compelled to pay that debt. For an example of this you may take the common case of an accommodation acceptor or endorser, who, as soon as he has been obliged to pay the money, may maintain an action against the person for whose accommodation he so endorsed or accepted.[1]

**Secondly*, where the person who is sought to be charged *adopts*, and *takes advantage of* the *benefit* of the consideration. Suppose, for instance, A. purchases goods for B. without his sanction, B. may, if he think fit, repudiate the whole transaction; but if, [*111]

[1] This principle is well illustrated by the case of Draughan v. Bunting, 9 Iredell, 13, where the plaintiff, who had endorsed and been compelled to pay a promissory note, relied in an action against a prior endorsee, on a parol promise of indemnity given to him by the maker at the time of the endorsement. The court held it clear that the action could not be sustained on the parol promise, because being one "to answer for the debt or default of another," it came within the Statute of Frauds, and should therefore be in writing, but that the law *implied* a promise to indemnify from the relation of suretyship, upon which the plaintiff might have recovered, but for the following circumstance; the plaintiff, in order to prove this parol promise, had called the maker of the note as a witness, and had been obliged to execute *a release* to him, in order to restore his competency, and it was urged that this release to the principal discharged the surety, which was undoubtedly correct, as the court held; but it being also in evidence that the defendant had acknowledged the receipt of funds from the maker, wherewith to discharge the debt, it was held that a promise was implied thus to apply the money, and the plaintiff was held entitled to recover upon his count for money paid.

instead of doing so, he receive the goods and take possession of them, the law will imply a request from him to A. to purchase them, and will also imply a promise by him to repay A., and he will be liable in an action of *assumpsit* for money paid to his use, founded on that implied promise. See 1 Wms. Saund. 264, note 1, where you may, if you please, find a great deal of valuable information on the whole subject of which I am now treating.(*a*)[1]

[*112] *The *third* case, in which a request is implied, is that in which a person does without compulsion, that which the person sought to be charged was compellable by law to do. Suppose, for instance, A. owe B. 50*l.*, and C. pays it; now here, if A. promise to repay C., it will be implied that the payment by C. was made at his request. (See Wing v. Mill, 1 B. &

(*a*) The cases where goods have been supplied to children without the knowledge or express request of the father, fall within this rule. Even where the goods supplied are necessaries, some recognition amounting to adoption is requisite, in order to render the father liable, and to support the implied request and promise; in such case it is sufficient that the father should have seen them worn by the child without objection. (Law v. Wilkin, 6 Ad. & El. 718, 33 E. C. L. R.) The implication arising from acceptances is equally binding on all parties to the contract who have received benefit from the consideration; see The Fishmongers' Company v. Robertson, 5 M. & Gr. 192, 44 E. C. L. R. In that of Urmston v. Newcomen, 7 Ad. & Ell. 899, 34 E. C. L. R., there appears to have been a doubt whether a father could be liable for necessaries supplied to his deserted infant child by a third person without his request, no proof of any contract being given, nor any subsequent adoption of it; but this would now be held to amount merely to a moral consideration, "which is nothing." See post p. 117, note *a*.

[1] Instances of the application of this rule will be found in Pawle v. Gunn, 4 Bingh. N. C. 448, 33 E. C. L. R.; Derby v. Wilson, 14 Johns. 378; Rowntree v. Holloway, 13 Alab. 357; Kenan v. Holloway, 16 Id. 58; Guerard v. Jenkins, 1 Strobhart, 171.

A. 104, 20 E. C. L. R.) But, in this class of cases, you will observe, though the request is implied, where there is a promise, yet the promise must be *express*, for the law will not imply one, as in the last two cases: thus, if A. is B.'s surety, and is forced to pay his debt, the law implies a request to pay it, and a promise to repay. If he be not B.'s surety, but pays it of his own accord, the law implies neither promise nor request, for a man cannot make me his debtor by paying money for me against my will.[1] Yet, even in this case, if B. *expressly* promise to repay it, a request by him to pay it is implied, for it is a maxim that *omnis ratihibitio retrotrahitur et mandato equiparatur*.[2]

In the three cases I have just put, the law *implies* a request, on the part of the person sought to be charged, to do that which is relied on as the consideration for the promise upon which it is sought to charge him.(*a*)[3]

(*a*) Since this was written the authorities on this point have been reviewed in the case of Kaye v. Dutton, 7 M. & Gr. 807, 49 E. C. L. R., and although the decision there turned upon entire absence of consideration, the remarks in the judgment lead to the conclusion that, wherever the consideration is executed it will support an express subsequent promise only where the law itself implies no other promise, and where there has also been an EXPRESS previous request: but that where the law implies a promise from the consideration, no

[1] Durnford v. Messiter, 5 Maule & Selw. 445; Weakly v. Brahan, 2 Stewart, 500; Keenan v. Holloway, supra; Lewis v. Lewis, 3 Strobhart, 532; Mathews v. Colborne, 1 Id. 258; Young v. Dibbrell, 7 Humph. 270.

[2] Winsor v. Savage, 9 Metcalf, 348; Lewis v. Lewis, 3 Strobhart, 530; 1 Saunders, 264, n.

[3] The salutary legal principle which lies at the bottom of all the cases upon this subject, is, that every legal liability must spring from something *actually done*, and not from something *merely said*. From this, it is easy to perceive how it is, that from certain acts the law will imply a promise, which shall be so highly regarded that an express promise shall not be allowed to vary it (Hopkins v. Logan, etc., supra), and while at the same time it will disregard the most solemn

[*113] *There is a fourth class of cases, in which the consideration relied on has been that one

express promise, differing from that implied by law, can be enforced. In Kaye v. Dutton, Tindal, C. J., said, "Two objections were made to the declaration, first, that it did not show any consideration for the promise by the defendant;—secondly, that the promise was laid in respect of an executed consideration, but was not such a promise as would have been implied by law from that consideration, and that, in point of law, an executed consideration will support no promise, although express, other than that which the law itself would have implied. The cases cited by the defendant, viz., Brown v. Crump, 6 Taunt. 300, 19 E. C. L. R.; Granger v. Collins, 6 M. & W. 458; Hopkins v. Logan, 5 M. & W. 241; Jackson v. Cobbin, 8 M. & W. 790, and Roscorla v. Thomas, 3 Q. B. 234, 43 E. C. L. R., *certainly support that proposition to this extent,—that, where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it*

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verbal undertaking that does not spring from some actual transaction. Hence it is, that a warranty *after* a sale cannot be enforced, unless something new be done at the time of giving the warranty, for the promise stands upon words and not upon acts. Roscorla v. Thomas, supra; Hogins v. Plympton, 11 Pick. 97; Williams v. Hathaway, 19 Pick. 387; Bloss v. Kittridge, 5 Verm. 28. In like manner, an undertaking by a landlord for his tenant's quiet enjoyment, is, when made after the contract of tenancy has been entered into, wholly ineffectual for any purpose; Granger v. Collins, 6 Mees. & Wels. 458. So, after a bargain has been made, a naked promise to pay more or to take less than the contract price, is useless to the party receiving it; Geer v. Archer, 2 Barbour, S. C. R. 420; Williams v. Hathaway, 19 Pick. 387. And the reason of these cases is obvious, from the danger which would arise if mere conversations, unsupported by acts, were allowed to go to a jury, as evidence from which they might mould them into contracts. Hence, too, arises an important class of cases, which determine that a precedent debt cannot, of itself, form a sufficient consideration for a promise, for such a debt arises from a contract already fulfilled, and therefore comes within the general principle just stated; Hopkins v. Logan, 5 Mees. & Wels. 241; Vadakin v. Soper, 1 Aiken, 287; Russell v. Buck, 11 Verm. 176; Barker v. Bucklin, 2 Denio, 59; Rail Road Co. v. Johnson, 7 Watts & Serg. 317–328; Jackson v. Jackson, 7 Alab. 791; although, when such

man has done *for another something which that other, though not *legally*, is morally bound [*114]

has been executed, differing from that which by law would be implied, can be enforced. But those cases may have proceeded on the principle that the consideration was exhausted by the promise implied by law, from the very execution of it; and, consequently, any promise made afterwards must be *nudum pactum*, there remaining no consideration to support it. *But the case may, perhaps, be different where there is a consideration from which no promise would be implied by law; that is, where the party suing has sustained a detriment to himself, or conferred a benefit on the defendant,* AT HIS REQUEST, *under circumstances which would not raise any implied promise.* In such case it appears to have been held, in some instances, that the act done *at the request of the party charged*, is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done. Hunt v. Bate, Dyer, 272, and several cases mentioned in the margin of the report of that case, seem to go to that extent, as also do some others collected in Roll. Abr. Action sur Case."

In Hopkins and wife v. Logan, the declaration stated that after the intermarriage of the plaintiffs, to wit, on the 1st of October, 1838,

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a promise is cotemporaneous with an *actual transaction*, such as a suspension, or an extinguishment of the precedent debt,—the acquisition of an additional security for its payment,—the commencement of a new course of dealing, or the like, it will be enforced by law, for it does not rest on mere words; Peate v. Dicken, 1 Cr. Mees. & Rosc. 422; Wilson v. Coupland, 5 Barn. & Ald. 228; Clark v. Sigourney, 17 Connect. 511; Phillips v. Bergen, 2 Barb. 608; Smith v. Weed, 20 Wend. 184; Weld v. Nichols, 17 Pick. 538; Taylor v. Meek, 4 Blackford, 388.

The sound reasons for what would at first appear to be a pertinacious adherence to a narrow rule, are thus expressed by Mr. Hare, after a review of the authorities, in the note to Vadakin v. Soper, 2 Amer. Lead. Cases. "The general principle," says he, "which requires that every express contract shall be sustained by a cotemporaneous consideration, is, in effect, a rule of evidence of great importance, to the exclusion of fraud and misrepresentation from the tribunals of justice. If a mere verbal promise, without consideration, were sufficient to create a legal liability and sustain an action, no safety could be found against the misrepresentation of the most ordinary conversation, unless in the sagacity of the jury called to determine (perchance on a prejudiced or false relation), whether it was meant or understood as a positive obligation for the payment of money, or the fulfilment of

[*115] to do. In *such cases it is clear, that if there be no *express* promise to remunerate him, remune-

an account was stated between the husband on behalf of himself and wife of the one part, and the defendant of the other part, concerning moneys lent by the wife to the defendant, and remaining unpaid before and after the time of the intermarriage. Upon the account so stated the defendant was found indebted to the plaintiffs in a large sum of money; and in consideration of the premises promised to pay the same on the first of October then next ensuing. Thus the express promise was to pay money previously lent by the plaintiff's wife to the defendant *on a certain day*, whereas the promise implied by law arising upon an account stated between the parties, was to *pay on request*, and it was held that any other promise was *nudum pactum*.

Roscorla v. Thomas was an action for breach of warranty of a horse. The declaration alleged that, in consideration that the plaintiff, at the request of the defendant, had bought of him a horse for 30*l*., the defendant promised that he was sound and free from vice. It was objected, in arrest of judgment, that the executed consideration would not support the subsequent express promise that the horse was sound.

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an engagement of any other description. And if a past consideration were sufficient to give such an engagement validity, the danger would be as great, for men, though but little disposed to promise further compensation for past services in their own case, are sufficiently ready to believe such an allegation in that of another, especially if supported by any plausible pretence, that the amount originally bargained for was insufficient. The chance of an erroneous verdict would be still greater in those instances, in which a bargain has resulted disadvantageously for one of the parties, and where he has induced the other to hold any language which can be construed or perverted into a promise of indemnification. The necessity for proving the existence of a cotemporaneous consideration, obviates this danger, by bringing the evidence back from words to things, which are not so easily susceptible of mistake or falsification. The uncertainty which results from looking to the subsequent language of a party, as the test of his liability, has been found so great in the cases arising under the Statute of Limitations, as to lead to the introduction, in England, and some parts of this country, of legislative enactments, making it necessary that the acknowledgment of the debt should be in writing, and not be proved by mere verbal testimony. Yet in that case, the only effect of the evidence is to revive an anterior

ration cannot *be enforced. But it has been made a great question, and has been frequently [*116]

The Court held, after *Cur. Adv. Vult*, that, "the promise in the present case, must be taken to be, as in fact it was, *express;* and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an *implied* promise, will nevertheless support an express one. And we think that it will not. The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note to Wennall v. Adney, 3 Bos. & Pul. 249, and in the case of Eastwood v. Kenyon, 11 Ad. & Ell. 438, 39 E. C. L. R. They are

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liability, of which the original existence is proved aliunde, and it is therefore easy to imagine what would be the result if every transaction of human life were open to the interpretation which a witness or jury might choose to give to any subsequent conversation of which it is made the subject. It would, therefore, appear, that the rules of the common law with respect to considerations, so far from deserving the reproach of narrowness and illiberality which has been sometimes cast upon them, are really founded upon a just appreciation of the uncertainty of testimony, and the exigencies of life, and should be sedulously upheld and applied, and not explained away or disregarded. It may safely be asserted that they do more to prevent fraud and perjury than any legislative enactment which has been, or can be devised for that purpose, and that if they had not been laid down and defined by judicial sagacity, it would be necessary to introduce them by legislative authority."

It is necessary to distinguish the class of cases referred to, from those which decide that a promise to pay a debt barred by the statutes of bankruptcy or limitation is based upon sufficient consideration. Some expressions in the cases would seem to conflict with the general principle just referred to, but in reality the grounds of decision are in harmony. The promise of a debtor to pay a debt so barred, although it is often called a new promise, is in reality rather a *waiver* of the bar which the statute has interposed. In pleading, it is sufficient to count on the original debt, and when the statute is pleaded, the evidence offered under the replication of a new promise or acknowledgment within six years, forms no variance between the declaration and the proof, for whether the defendant is liable by reason of the original

[*117] discussed whether, *even if there be an express promise, any request can be implied in order to

cases of voidable contracts subsequently ratified, of debts barred by operation of law, subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law."

Here it will be seen that no promise was implied by law, but neither was there any previous express request: this decision therefore strongly supports the position that an express promise alone will not suffice, even where the law implies no promise. In Hopkins v. Logan, there was a promise implied by law.

Express request appears to be unnecessary where the promise is implied by law. In Victors v. Davies, 12 M. & W. 758, the Court of Exchequer held, as we have seen, that it was not necessary to aver a previous request to support a count for money lent. Mr. Baron Parke very strongly marks the distinction between the cases where the law implies a promise, and where it does not imply it, as determining the necessity of a previous request. "There cannot," he

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consideration for the debt, or by reason of his subsequent acknowledgment, is immaterial, provided the plaintiff prove the original consideration, and the liability at the time of suit brought, and if that liability arise from the new promise, it is just such a liability as the law implies from the old consideration, and hence the new promise accords with the old one, and there is no variance. This will be found fully explained in the note to Whitcomb v. Whiting, 1 Smith's Leading Cases, 621, 4th Am. ed. But in the ordinary case of a precedent debt, a declaration setting forth that the plaintiff had contracted to build a wagon for $100, and that having done so, the defendant, in consideration thereof, promised to pay him $200, would be clearly bad, for such a promise would not be implied by law from the old consideration, which was the only one. So, in the case of an indebtedness to two persons jointly, a promise by the debtor, in consideration of the promise, to pay one-half the debt to one of them, could not be enforced, for it is not such a promise as the law implies from the old consideration, and this was the case of Vadakin v. Soper, supra.

support the consideration. On this question, which is but a branch of one which has been often the sub-

says, "be a claim for money lent unless there be a loan, and a loan implies an obligation to pay. If the money is accepted, it is immaterial whether or not it is asked for. *The same doctrine will not apply to money paid, because no man can be a debtor for money paid, unless it was paid at his request.* What my brother Manning says, in the note to which I have referred, is perfectly correct." In this masterly comment by Serjt. Manning, which will be found in 1 M. & Gr. 265, n. *a*, 39 E. C. L. R., he confutes the contrary doctrine put forth by Mr. Serjt. Williams, in his note to the case of Osborne v. Rogers, 1 Saund. 264, n. 1. Serjeant Manning says:—"Even where the consideration is entirely past, it appears to be unnecessary to allege a request of the act stated, as the consideration cannot, from its nature, have been a gratuitous kindness, but imports a consideration *per se.*"

Express requests are therefore of limited avail; for it is thus settled, by the concurrent judgment of the three Courts, that where the promise made differs from that implied by law, such express promise cannot be enforced, and express promises are therefore nugatory in such cases, whether there be an express request or not. In Hopkins v. Logan, the law would, according to the doctrine in Victors v. Davies, have implied the request, had the promise itself been that which the law implied; and Mr. Justice (then Baron) Maule went further, and laid down the rule of law too broadly to admit of any qualification in the case of an express request:—"An executed consideration is no consideration *for any other promise* than that which the law would imply; *if it were, there would be two coexisting promises on one consideration.*" It would appear that the maxims, "*Expressum facit cessare tacitum,*" as well as "*Omnis ratihibitio retrotrahitur et mandato equiparatur,*" do not apply where it is sought to uphold a past consideration by any different promise than that implied by law.

Where *no* promise is implied by law from the executed consideration, it is certainly deducible, no less from old law than from the recent judgment in the Common Pleas, that an express promise may be enforced, *provided the consideration were moved by a previous express request.* Hunt v. Bate (see ante) implies that a request would have sufficed; and in Lampleigh v. Braithwaite it is laid down, in express terms, that "if a voluntary courtesy be moved by a suit on request of the party that gives the assumpsit, it will bind: for the promise that

ject of anxious consideration, namely, in what cases a moral obligation is a sufficient consideration to support a promise, you may see Lee v. Muggeridge, 5 Taunt. 36; Atkins v. Banwell, 2 East, 505, the note to Wennall v. Adney, 2 B. & P. 250; Eastwood v. Kenyon, 11 A. & E. 438.(*a*)[1]

follows is not naked, but couples itself with the suit before and the merits procured by that suit."

It follows from the foregoing cases, that where the consideration is executed, an express promise without an express previous request is in no case of avail;—and where it is preceded by an express request,—then only where the law implies no other promise.

(*a*) The recent cases leave no doubt on the subject. There being no promise implied, by law, the rule laid down in the last note does not determine this question; but the law of moral obligation does, which is concisely stated by Mr. Baron Parke, in Jennings v. Brown, 9 M. & W. 501:—"A mere moral consideration, *which is nothing:*" and Tindal, C. J., in Kaye v. Dutton, says, "A subsequent express promise will not convert into a debt that which of itself is not a legal debt." If more authority be required on the point, it will be found in the judgment to which Mr. Smith refers in Eastwood v. Kenyon, where the conclusion deduced from the cases in the note to Wennall v. Adney, 3 Bos. & Pul. 247, is upheld, and is as follows:—"An express promise can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original cause of action, if the obligation on which it is

[1] In some of the earlier American cases, there were many dicta, and a few decisions in favour of a moral consideration being sufficient to support a promise; Greeves v. M'Allister, 2 Binney, 591; Willing v. Peters, 12 Serg. & Rawle, 177; Doty v. Wilson, 14 Johnson, 378; but these cases, like the English decisions in Lee v. Muggeridge, and Wing v. Mill, 1 Barn. & Ald. 104, were subsequently expressly overruled by Snevily v. Reed, 9 Watts, 396; Kennedy v. Ware, 1 Barr, 445; Mills v. Wyman, 3 Pick. 207; Beaumont v. Reeve, 8 Queen's Bench, 483, 55 E. C. L. R.; Cook v. Bradley, 7 Connect. 57; Loomis v. Newhall, 15 Pick. 159; Dodge v. Adams, 19 Id. 429; Kinnerly v. Morton, 8 Missouri, 698; Kenan v. Holloway, 16 Alab. 58; and such a doctrine may, perhaps, be now fairly considered as having no established place in the jurisprudence of either country.

*I shall say no more upon the subject of *executed* and *executory* considerations, a subject upon which I almost regret having entered; for the distinctions on which I have been forced to touch are so nice, and so hard to be conveyed in the rapid and cursory suggestion of a lecture, that I fear there may be some among my audience to *whom I may not have succeeded in rendering all that I have said upon that part of the subject intelligible. I should have left the subject incomplete had I not touched upon them, and that was the reason which induced me to do so. I have now said what I intended to say with regard to the sufficiency of the consideration, and the result may be thus summed up. [*118] [*119]

Any advantage to the person promising, or damage, inconvenience, liability, or charge to the person to whom the promise is made, constitutes a sufficient

founded never could have been enforced at law, though not barred by any legal maxim or statute provision." Lord Denman, C. J., thus explains in Eastwood v. Kenyon, the broad principle upon which this doctrine is upheld in one of those great judgments which characterize our courts of common law:—"The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society, one of which would be the frequent preference of voluntary undertakings to claims for just debts: suits would thereby be multiplied, and voluntary undertakings would also be multiplied to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult." In Monckman v. Shepherdson, 11 Ad. & Ell. 415, 39 E. C. L. R., the same doctrine was applied, and it was there held that even where a good consideration had existed and had been forfeited, it could not be revived by parol promise founded on a moral obligation. See also Beaumont v. Reeve, 15 Law Journ. Q. B. 141 [since reported 8 Queen's Bench, 483, 55 E. C. L. R.], where these cases are cited as settled law; and the decision in Lee v. Muggeridge, 5 Taunt. 36, must be considered as overruled. (See post, p. 122, note *a*.)

consideration to uphold a promise; but, if that consideration be executed, that is, if, at the time of making the promise, that which is to be the consideration for it has already taken place, in such case there must have been a *request* by the person promising, in order to render such a consideration sufficient. If an *express request* can be shown, there can be no difficulty; but, if not, the law will imply one in certain cases, and those cases are,

1st. Where the consideration consists in the person to whom the promise is made being compelled to do that which the person making it ought to have done, and was compellable to do.

2dly. Where the consideration consists in something the benefit of which the person promising has accepted and enjoyed.

3dly. Where the consideration consists in the person to whom the promise is made having *voluntarily* done that which the person promising ought to have done, and was compellable to do (and in this third case the promise must be an *express* one, whereas in the two former, the law implies *it* as well as the request). *Lastly*, the case which, as I have said, is even now doubtful, and which depends on the question whether the voluntary performance of that to which a man was morally though not legally obliged, be of itself sufficient to support an *express* promise by him to remunerate the party performing it.(*a*)

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Proceeding in the order in which I stated to you that it was my intention to proceed, the next subject at which we arrive is the effect of *illegality* upon the

(*a*) See ante, p. 117, n. *a*.

contract. And, upon this subject, I have already said generally, that every contract, be it by deed or be it without deed, is void, if it stipulate for the performance of an illegal act, or if it be founded upon an illegal consideration. *Ex turpi causâ non oritur actio* is the maxim of ours, as well as of the civil law. (*a*) *A deed, for the purpose of charging the maker, [*121] requires, as we have seen, no consideration at all to support it; but an illegal consideration is worse than none, and if it be founded upon such a one, it will be void, nor will the rules relating to estoppel prevent the party from setting that defence up. A simple contract *requires*, as we have seen, a consideration to support it. If the consideration be illegal, it is *à fortiori* void, nor will rules which I endeavoured to explain regarding the admissibility of parol evidence to contradict a writing prevent that defence from being set up where the illegality does not appear on the

(*a*) It is immaterial whether the illegality be part of or only introductory to the cause of action; if the plaintiff requires any aid from an illegal transaction to make out his case, he cannot maintain it; Simpson v. Bloss, 7 Taunt. 246; [Scott v. Duffy, 3 Harris, Pa. 18; Deering v. Chapman, 22 Maine, 488.] This rule was upheld in the very recent case of Fivaz v. Nicholls, 15 Law Journ. 125, C. P. [2 C. B. 500, 52 E. C. L. R.], where the plaintiff brought an action on the case against the defendant for having corruptly conspired to cheat the plaintiff, and deprive him of his costs in a previous action on a bill of exchange, in which the plaintiff obtained judgment on the ground that it was given for an illegal consideration; but it having appeared that the bill had been originally endorsed by the plaintiff to the defendant to compromise a felony, this illegality being the foundation of the subsequent action, was held to invalidate it, [and to the same effect are Bridge v. Hubbard, 15 Mass. 96; Tuthill v. Davis, 20 Johns. 287; Edwards v. Skirving, 1 Brevard, 548; Coulter v. Robertson, 14 Smedes & Marsh. (Miss.) 29, where the illegality of the original consideration was held to taint all the subsequent securities flowing from it.]

face of the instrument, any more than the doctrine of estoppel will avail to prevent inquiry into the true consideration for a deed. Parties cannot deceive the law by the form of their contracts; and, as an illegality in the consideration is fatal, so, and upon the very *same grounds*, is one in *the promise*. "*You shall not*," says the L. C. J. in Collins v. Blantern, "stipulate for iniquity."

If the consideration be legal, a promise to do several acts, some illegal and some legal, renders the contract [*122] valid quoad the legal acts; but if any *part of the consideration be illegal, the whole contract fails.

Now, illegality is of two sorts: it exists *at common law*, or is created *by some statute*.

A contract illegal at common law is so on one of three grounds: either *because it violates morality; or because it is opposed to public policy; or because it is tainted with fraud*.

Of the first class, those namely which are void because they violate the principles of morality, you will find an example in the case of Fores v. Johnes, 4 Esp. 97, in which Mr. Justice Lawrence held, that a print-seller could not recover the price of libellous publications which he had sold and delivered to the defendant. "For prints," said his lordship, "whose objects are general satire or ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral, nor for such as are libels on individuals, and for which the plaintiff might be rendered criminally answerable for a libel."(*a*)[1]

(*a*) The great majority of cases tainted with immorality arise from

[1] So it was held that the printer of the "Memoirs of Harriet Wil-

*Next with regard to the second class,(a) those namely which are void as contravening [*123] prostitution. And we have seen, that any contract of which the object is the continuance of an immoral connexion, is void, and this has been extended to actions for the recovery of rent for lodgings used by a prostitute, where the landlord was cognizant of the purpose to which they were put; (Girarldy v. Richardson, 1 Esp. R. 13; Jennings v. Throgmorton, R. & M. 251, 21 E. C. L. R.; Commonwealth v. Harrington, 3 Pickering, 30.) The distinction must be noted between the cases in which the consideration is immoral, and where there is none: a contract by parol is void not because it is immoral, but because there is no consideration at all. An instance of this occurred in the case of Binnington v. Wallis, 4 B. & Ald. 650, 6 E. C. L. R., where it was held that past cohabitation alone or ceasing to cohabit in future will not suffice; and in Eastwood v. Kenyon, supra, the doctrine in Wennall v. Adney, supra, has been applied to these cases, namely, that "an express promise can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise." Now a moral obligation is not a good consideration, but, according to Parke, B. in Jennings v. Brown, 9 Mees. & Wels. 496, "is nothing." Consistently with this doctrine it was held, in the recent case of Beaumont v. Reeve, supra, that even past seduction was no consideration for a promise to pay an annuity. Where, however, some executory consideration, not immoral, enters into the contract it is maintainable, and this forms the ground on which the case of Gibson v. Dickie, 3 M. & S. 463, is distinguishable from those just cited. There the consideration was that the woman should continue single, and not cohabit with D. G., or any one else. It is, however, a question whether such a contract might not be held void, as being in restraint of marriage. Agreements to pay money in support of a bastard child, the result of cohabitation, are on the same principle held good, as there is a liability on the father to do so; Jennings v. Brown, supra.

The rule to be deduced from the cases is, that simple contracts are void where the consideration is either merely moral or immoral; but

(a) Instances abound in the books of cases where contracts have been thus avoided, as where public offices are obtained on private

son" could not recover the price of printing them, the work being

[*124] public *policy; and it might, perhaps have been more simple to have ranked this and the former

that bonds are void only where the consideration is immoral, as in all cases where it appears that future cohabitation is contemplated-See Smyth v. Griffin, 14 Law Journ. L. C. 28.

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understanding injurious to the purity of the public service; (Gar.

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immoral and libellous; Poplett v. Stockdale, Ryan & Moody, 337, 21 E. C. L. R.

Nothing is better settled than that a promise in consideration of future illicit cohabitation is void; Walker v. Perkins, 3 Burrow, 1568; Rex v. Inhabitants of Withringfield, 1 Barn. & Adolp. 912, 20 E. C. L. R.; Winnebrun v. Weisiger, 3 Monroe, 35; Travinger v. M'Burney, 5 Cowen, 253; and it is immaterial whether such promise be or be not backed by the solemnity of a seal; Walker v. Perkins. But where the sealed instrument is given in consideration of *past* seduction or cohabitation, it will be enforced; Turner v. Vaughan, 2 Wilson, 339; Wye v. Mosely, 6 Barn. & Cress. 133; while a *parol* promise, based upon such a consideration, is worthless; Beaumont v. Reeve, 8 Queen's Bench; Singleton v. Bremar, Harper, 201. The distinction between these classes of cases is this: *all* contracts, whether sealed or parol, based upon *future* immoral connexion, are void, because to enforce them would be to offer a premium for future immorality. And all *parol* contracts in consideration of *past* connexion are void, on the simple ground of the consideration being executed, and the transaction not being such, as according to the rules already explained, the law would *imply* a promise to pay for. But a *specialty* given for *past* connexion can be enforced, because there is a consideration, viz., that imported by the seal, and as regards the immorality, the injury having been already done, there is no principle of law that forbids its being remedied, and it has been latterly held that even if connexion be continued after the giving of the bond, that will not vitiate the instrument, if such continuance did not enter into the transaction; Hall v. Palmer, 3 Hare, 532; and in a trial at Nisi Prius, Best, Ch. J., left it to the jury to determine, whether at the time of giving such a bond, the continuance of the connexion formed part of the transaction, for if it did, the obligee could not recover; if it did not, there was nothing in the transaction prohibited by the law; Friend v. Harrison, 2 Car. & Payne, 584, 12 E. C. L. R.

There is a class of cases which determine that promises in conside-

as one and *the same class, since it is obvious that wherever a contract has an immoral ten- [*125]

forth v. Fearon, 1 H. Bl. 327; Blachford v. Preston, 8 T. R. 89.)[1] All acts whereby favouritism is purchased at the sacrifice of any public trust or interest, such as contracts with particular creditors against the policy of the bankrupt laws (Nerot v. Wallace, 3 T. R. 17; Davis v. Holding, 1 M. & W. 159; and Staines v. Wainwright, 6 B. N. C. 174, 37 E. C. L. R.), or of purity of election. See Coppock v. Bower, 4 M. & W. 361, where a petition having been presented to the House of Commons against the return of a member on the ground of bribery, the petitioner entered into an agreement in consideration of a sum of money, and upon other terms, to proceed no further with the petition, it was holden that this agreement was illegal.[2] So are

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ration of a forbearance or compromise of a prosecution for bastardy, can be enforced; Haven v. Hobbs, 1 Vermont, 238; Holcomb v. Stimpson, 8 Id. 141; Robinson v. Crenshaw, 2 Stew. & Porter, 276; Maurer v. Mitchell, 9 Watts & Serg. 71; and these cases proceed upon the ground of the prosecutions being rather civil in their character. See note 1, to next page.

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[1] Thus, no action will lie on a contract to procure the appointment of clerk of a court, or any office relating to the administration of justice; Haralson v. Dickins, 2 Car. Law Reps. 66; Lewis v. Knox, 2 Bibb, 453; Carlton v. Whitcher, 5 New Hamp. 196; Proprietors v. Page, 6 Id. 183; or to promote the election of a candidate for office; Swayze v. Hull, 3 Halsted, 54; Dearborn v. Bowman, 3 Met. 135; Duke v. Asbee, 11 Iredell, 112. So of the procuring or defeating by improper means or personal influence the passage of an act of the legislature; Wood v. M'Cann, 6 Dana, 366; Clippenger v. Hepbaugh, 5 Watts & Serg. 315, or the use of interest to procure the pardon of a convict; Norman v. Cole, 3 Esp. 253; Hatzfield v. Gulden, 7 Watts, 152.

[2] So, where in contemplation of an assignment for, or composition with creditors, or of bankruptcy, an agreement whereby one creditor is to receive more than the others, cannot, if unknown to the rest, be enforced; Jackson v. Lomas, 4 Term, 169; Smith v. Cuff, 6 Maule & Sel. 160; Baker v. Matlack, 1 Ashmead, 68; Mann v. Darlington, 3 Harris, 312; (see Bradshaw v. Bradshaw, 9 Mees. & Welsb. 28, and Horton v. Riley, 11 Id. 492, as to the debtor's right

dency, there it is opposed to the public policy, and the only reason for dividing them into two classes is, that

all contracts which affect the rights of the revenue; for instance, all such as relate to smuggling, though the plaintiff merely aided in the act, are void; Lordson v. Temple, 5 Taunt. 181, 1 E. C. L. R. The mere sale of goods, however, by a person who takes no part in their illegal use afterwards, though he knows of it, has been held to be a valid contract; (Holman v. Johnson, 1 Cowp. 341.) And it may be taken as a general rule, applicable to all cases of illegality of contract, that where it is legal at the time it is made, the prior or subsequent illegality of transactions relating to it, but *not entering into the contract in question, or essential to it,* does not invalidate it; M'Callan v. Mortimer, 9 M. & W. 643. All contracts tending to any breach of the peace are void. It would be easy to multiply cases on this kind of illegality, but it is apprehended that the explanation of the law in relation to it would be nowise assisted by citing them.[1]

There is one illegality requiring notice—maintenance, or the illegal

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to recover back money so paid, which right is distinguished from the principle *in pari delicto, potior est conditio defendentis,* on the ground of advantage being taken of the debtor's circumstances to exercise oppression over him.)

[1] See the note to Collins v. Blantern, 1 Smith's Leading Cases, where many instances are collected. A class of cases, however, should be here referred to as of constant occurrence. These depend on contracts based on a compromise or compounding of some offence. It is well settled that an agreement to compound a felony will not be enforced, and any security based upon such a consideration will be void; on the other hand, some prosecutions for misdemeanour, as for example, for bastardy, Holcomb v. Stimpson, 8 Verm. 144; Maurer v. Mitchell, 9 W. & S. 71; Robinson v. Crenshaw, 2 Stew. & Porter, 276; or, for assault and battery, Price v. Summers, 2 Southard, 578; (unless when coupled with a riot, Kier v. Lehman, 6 C. B. 308, 51 E. C. L. R., in error, 9 Id. 371, 58 E. C. L. R., or with an intent to kill, Gardiner v. Maxey, 9 B. Monroe, 90,) are allowed to be compromised by the parties, and to form a valid consideration for promises based on such compromise. Where, however, the relation of debtor and creditor has existed between the parties, the compromise of prosecutions for secreting property, for obtaining money under false pretences, and

there are some contracts which involve no offence against the laws of morality, and nevertheless are

abetting of suits by parties not concerned in them, or to use the broad language of Coke, "When one maintaineth the one side without having any part of the thing in the plea or suit;" Co. Litt. 368 b.) But the ancient doctrine has been somewhat narrowed by more modern judgments; (see Master v. Miller, 4 T. R. 340, per Wilmot J.);[1]

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the like, is, if not held to form an illegal consideration (as it was in the late case of Shaw v. Reed, 30 Maine, 105), at least looked upon with the strongest disfavour, as affording a ready instrument to abuse and oppression; Prough v. Entriken, 1 Jones (Pa.), 81. The result of the authorities generally upon this subject appears to be that where the misdemeanour is one in which the welfare of society is immediately concerned, agreements based upon their compromise will not be sanctioned (and its having been done originally by the leave of the Court makes no difference, Kier v. Lehman, 9 Q. B. 394), but the rigour of the rule will be relaxed in proportion as the general welfare ceases to be interested, and the offence and its punishment becomes personal between the parties, and still more as the prosecution loses a criminal complexion, and assumes a civil one. In perhaps the most recent prominent case in England, Kier v. Lehman, supra, which went on error from the Queen's Bench to the Exchequer Chamber, Chief Justice Tindal, in delivering the opinion of the latter tribunal, said, that if the matter were *res integra*, they would have no doubt in holding that any compromise of any misdemeanour, or any public offence, was an illegal consideration to support a promise, and that it was remarkable what very little authority, consisting rather of dicta than decision, there was to support such considerations. "We have no doubt that in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so, but we are not disposed to extend this any further." And the current of more recent authorities on this side of the Atlantic, sets strongly against the validity of such considerations; Clark v. Ricker, 14 New Hamp. 44; Commonwealth v. Johnson, 3 Cush. 454; Gardner v. Maxey, 9 B. Monroe, 90.

[1] And see also Stanley v. Jones, 7 Bingham, 369, 20 E. C. L.

opposed to public policy; such, for instance, are contracts in *general restraint* of trade.

There seems to be nothing obviously immoral in a man's promising or covenanting not to carry *on [*126] his trade within the limits of England. Nevertheless, such a covenant or promise is totally void. This was decided so long ago as in the reign of Henry V. in the year-book of the second year of which reign, fol. 5, a bond restraining a weaver from exercising his trade was held void: and Judge Hall flew into such a passion, at the sight of it, that he swore on the bench, and threatened to send the obligee to prison till he had paid a fine to the king; upon which Lord Macclesfield observes, in Mitchell v. Reynolds, 1 P. Wm. 181, "that he could not but approve of the indignation the judge

it is now requisite in order to constitute maintenance, that a man should neither have nor believe he has any interest in the suit he abets, either individually or collectively with others. In this case only is he guilty of maintenance. But where landlords, for instance, have joined together in protecting their reversionary interest, supposing that all their tenants would be included in proceedings taken against some of them to extinguish a modus, and thereupon united in defending a suit brought against the tenants, this was held recently not to be maintenance. (Findon v. Parker, 11 M. & W. 675.) In that case Lord Abinger, C. J., said, "The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defences which they have no right to make." In such cases no contract arising out of the bringing or conducting such action is legal.

Champerty is an agreement to share the fruits of maintenance, and equally void. See Stanley v. Jones, 7 Bing. 369, 20 E. C. L. R., per Tindal, C. J.; and Stevens v. Bagwell, 15 Ves. jun. 139.

R.; Doe v. Evans, 1 Com. Bench, 717, 50 E. C. L. R.; Prosser v. Edmonds, 1 Young. & Col. 481; Harrington v. Long, 2 Myl. & Keen, 390; Anson v. Lee, 4 Simons, 364; Hunter v. Daniel, 4 Hare, 420; Wilson v. Short, 6 Id. 366.

expressed, though not of his manner of expressing it." Accordingly, such contracts have ever since been held void:

"The law," said Mr. J. Best, in Horner v. Ashford, 3 Bingh. 328, "will not allow or permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry or his capital, in any useful undertaking in the kingdom would be void."

But here arises a distinction, which was first established by Lord Macclesfield, in the celebrated case of Mitchell v. Reynolds, 1 P. Wms. 181, and which has ever since been upheld. It is, that, though a contract in general restraint of trade is void, one in partial restraint of trade may be upheld; provided the restraint be reasonable, and provided the contract be founded upon a consideration. "It may often happen," *continued Lord Wynford, then Mr. J. Best, at [*127] the place which I have just cited, "that individual interest and general convenience render engagements not to carry on trade, or act in a profession, at a particular place proper."(a) Such restraints were upheld in

(a) This judgment is cited in that of the subsequent case of Mallan v. May, 11 M. & W. 653, where the principle on which partial restraints of trade are held legal, is thus enlarged on by the Court of Exchequer:—

"Contracts for the partial restraint of trade are upheld not because they are advantageous to the individual to whom the contract is made, and a sacrifice, *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported; such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is in effect the sale of a good-will, and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry; (Prugnell v. Grosse, Alleyn, 67; Broad v.

[*128] *Chesman v. Nainby, 2 Str. 739, which was carried to the Lords, and is reported in 3 Bro. P. C. 349, in Davis v. Mason, 5 T. R. 118; in Proctor v. Sargent, 2 M. & Gr. 31, 40 E. C. L. R., and in Bunn v. Guy, 4 East, 190, where an attorney bound himself not to practise in London, or one hundred and fifty miles from thence. And, indeed, nothing, as you must be well aware, can be more common upon a dissolution of partnership, than for the retiring partner to covenant that he will not set up the same trade within a certain distance to the injury of the continuing partner. But these restraints must, in order to be upheld, be *reasonable:* that is, a greater restriction must not be wantonly imposed than can be necessary for the protection intended; (see Ward v. Byrne, 5 M. & W. 548; and the judgment in Horner v. Graves, 7 Bingh. 743, 20 E. C. L. R.; and such a contract, to be good, must be founded on a consideration, even although it be made by deed; see Hutton v. Harker, 7 Dowl. 439.(*a*)

Joliffe, Cro. Jac. 596; Jelliott v. Broad, Noy, 98.) And such is the class of cases, of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man taking a servant or clerk into his service, with a contract that he will not carry on the same trade or professional duties within certain limits; (Chesman v. Nainby.) In such a case the public derives an advantage from the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business."

(*a*) A liberal discretion is necessarily left to the courts to determine what is or is not a reasonable restraint: it is purely a question of law, and not for the jury; (Mallan v. May.) In Proctor v. Sargent, supra, Tindal, C. J., thus upholds the rule laid down in Hitchcock v. Coker, "I think the rule is properly laid down in Hitchcock v. Coker, where it is said, 'that where the restraint of a party from

It was at one time *thought that the Court would enter into the question of the adequacy [*129]

carrying on a trade is larger and wider than the protection of the person with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must therefore be void.' Although a contract restraining a party from carrying on the business of a dentist within 100 miles round York was decided to be unreasonable in Horner v. Graves, it does not follow that we are to hold in this case that a radius of five miles is also unreasonable. This must depend upon the population, the nature of the business, and how far it is ramified in that radius, and upon other circumstances of which we are not bound to take notice. Also I think that when we are deciding upon the unreasonableness of a contract of this kind, we cannot leave out of consideration the duration of the restraint; for although I admit that where we once hold a restriction to be unreasonable in point of space, the shortness of the time for which it is imposed will not make it good; yet where the question is, whether the restraint is unreasonable or not in point of space, that which would be unreasonable, were it to continue for any length of time, may not be so when it is to last only for a day or two." In Horner v. Graves, Tindal, C. J., laid it down as the best test that "Whatever restraint is larger than the necessary protection of the party with whom the contract is made is unreasonable and void, as being injurious to the interests of the public." The Court of Exchequer, in the judgment in the case of Mallan v. May, cite the rule, and thus review the cases:—

"Applying this rule and referring to the analogous authorities, it appears to us that for such a profession as that of a dentist, the limit of London is not too large; in Davis v. Mason, 5 T. R. 118, Thetford, and ten miles round; in Hayward v. Young, 2 Chitty, 407, 18 E. C. L. R., twenty miles round a place was held a reasonable limit in the case of a surgeon; in that of an attorney, London, and 150 miles round, in Bunn v. Guy, 4 East, 190; and in Proctor v. Sargent, 2 Man. & Gr. 20, 40 E. C. L. R.; 2 Scott; N. R. 289, five miles from Northampton Square, in the county of Middlesex, was held reasonable in the case of a milkman. And it makes no difference, in our opinion, that it appears on the face of this record that London contains a million of inhabitants. We doubt, indeed, whether the comparative populousness of particular districts ought to enter into consideration at all; if it did, it would be difficult to exclude others, such as the number of men of the same profession, the habits of the

[*130] of this consideration, and *would hold the contract void if the consideration were inadequate. However, it has lately been decided in the Exchequer chamber, after great consideration, that the question of adequacy or inadequacy cannot be entertained, but that the parties must judge of that for themselves; Archer v. Marsh, 6 A. & E. 966, 33 E. C. L. R.; Hitchcock v. Coker, 6 A. & E. 439; which cases you may perhaps remember my citing on the last evening as strong instances of the unwillingness of the Courts to enter into the question of the *inadequacy of consideration* at all. (*b*)[1]

people in that neighbourhood, and other matters of a fluctuating and uncertain character, which would produce great difficulty and embarrassment in determining such a question."

This clearly developes the principle which the Courts will apply to each case according to its facts; Rannie v. Irvine, 8 Scott, 674, and Green v. Price, 13 M. & W. 695, proceeded on the same principle; the former deciding that an agreement not to supply the same customers, as the master, was valid; and the latter, that an unreasonable restraint as to limit did not vitiate another reasonable restraint contained in the same bond. [So, in the very recent case of Elves v. Crofts, 10 Com. Bench, 259, it was urged that the class of cases cited, proceeded upon the assumption that the restriction was necessary for the protection of the covenantee, and hence that it must be construed as ceasing to operate in a case where the covenantee or his assigns had ceased to carry on the business. But it was held that if the covenant were binding to its full extent when made, its signification could not be varied by any subsequent occurrence, and that to hold otherwise, would be to render its import uncertain, and to impair its efficiency for that protection which the law contemplates as just.]

(*b*) See ante, p. 95, et seq.

[1] See the note to Mitchell v. Reynolds, in 1 Smith's Leading Cases, 430. In this country, the general principle that contracts in restraint of trade, so far as they may prevent the exercise of a particular calling, are void, has been frequently recognised and enforced, as for example, a contract never to be engaged in the business of founding iron, Alger v. Thatcher, 19 Pick. 51; manufacturing chocolate, Vickery v. Welch, Id. 523; wool-carding, Pyke v. Thomas, 4 Bibb, 486, and the like, while the exception has been equally

Another example of contracts illegal because in contravention of public policy, is afforded by those cases in which contracts in general *restraint of marriage have been held void. Thus in, Lowe v. [*131] Peers, 4 Burr. 2225, a defendant entered into the following covenant:—

established of sanctioning such contracts where the restraint applies only to a particular locality; Pierce v. Fuller, 8 Mass. 223; Pierce v. Woodward, 6 Pick. 206; Noble v. Bates, 7 Cowen, 307; Palmer v. Graham, 1 Parson's Eq. Cases, 476. It is stated in the text that the later English cases show an unwillingness to enter into the question of adequacy of consideration, and a strong instance of this may be seen in the very recent case of Atkyns v. Kinnier, 4 Excheq. 776, where the defendant bound himself in the sum of £1000, as liquidated damages, not to practise as a physician within two miles and a half of a certain place. He did practise a few feet within that distance, measuring by a less frequented road than the usual thoroughfare, though by the latter he was beyond that distance, and there was no evidence that the plaintiff had sustained any damage from his having done so. The jury having, under the direction of the Court, found a verdict for £1000, the Court of Exchequer discharged a rule to reduce the damages to a shilling, and held that the defendant must abide by the contract he had made. But in New York, it has been held, that, prima facie, the law presumes even limited restraints on trade to be void, and that they will only be upheld upon sufficient proof of their reasonableness, both as to consideration and usefulness; Chapel v. Brockway, 21 Wendell, 158; Ross v. Sadgbeer, Id. 166. In the latter case, to a declaration on a bond conditioned that the defendant should not manufacture pearl ash for ten years, nor within forty miles of a certain place, a general demurrer was sustained by the Court, on the ground that the consideration imported by the seal did not afford a presumption of such circumstances and reasons as were requisite to uphold such a contract. Prior and subsequent decisions in that State have not, however, observed such a rule, and an agreement not to practise as a physician within six miles, or pay $500 for every month of such practice (Smith v. Smith, 4 Wendell, 468), and an agreement not to set up a rival newspaper, or pay $3000 (Dakin v. Williams, 17 Wend. S. C. in error, 22 Id. 201), were respectively enforced, and the sums named held to be liquidated damages and not a penalty.

"I do hereby promise Mrs. Catharine Lowe that I will not marry any person besides herself. If I do, I agree to pay her £1000, within three months after I shall marry anybody else." The Court of Queen's Bench held this contract void, remarking, "that it was not a promise to marry her, but not to marry any one else, and yet she was under no obligation to marry him."

This case was affirmed in error; see Wilm. 364.[1] So where a lady gave a bond conditioned not to marry, the Court of Chancery ordered it to be delivered up; Baker v. White, 2 Vern. 215.

On the subject of Marriage I may further mention, that a deed tending to the *future* separation of husband and wife is *void* on grounds of public policy; Hindley v. Marquis of Westmeath, 9 B. & C. 200,[2] 17 E. C. L. R., although a deed providing a fund for her support on the occasion of an *immediate* separation is not so; Jee v. Thurlow, 2 B. & C. 547,[3] 9 E. C. L. R. The distinction between the two cases is obvious. The deed, in the former case, contemplates and facilitates that which the law considers an evil, namely, the separation of husband and wife; in the latter case, the evil is inevitable, and the effect of the deed is but to save the wife from destitution.

Almost the converse of these cases of deeds of separation are what are called

Marriage brocage contracts, that is, where a man has [*132] agreed, in consideration of money, to *bring about a marriage. These are all void as against public policy, the law considering that unions so brought about are unlikely to be happy ones. This class of cases is founded upon Hall v. Potter, 3 Levinz, 411, in

[1] This reference is to "Wilmot's Notes of Opinions and Judgments."

[2] Durant v. Titley, 7 Price, 577; Jones v. Waite, 7 Scott, 317; Westmeath v. Westmeath, 1 Jacob, 126, S. C. in House of Lords, 1 Dow & Clark, 519; Carson v. Murray, 3 Paige, 601.

[3] St. John v. St. John, 11 Vesey, 534.

which Thomas Thinne gave an obligation of 1000*l.* to Mrs. Potter, conditioned to pay her 500*l.* within three months after he should be married to Lady Oyle, "a widow," the reporter says, "of great fortune and honour, for she was the daughter and heir of Jocelyn Percy, Earl of Northumberland." The Master of the Rolls decreed this bond to be void; the Lord Keeper reversed the decree; whereupon there was an appeal to the House of Peers, and, upon hearing the cause there, all the Lords but three or four, were of opinion that all such contracts are of dangerous consequences, and ought not to be allowed; and they reversed the decree of dismissal made by the Lord Keeper, and decreed the obligation to be void.

Another, and an extensive class of cases is that in which the contract has a tendency to obstruct the course of public justice. The time, however, will not permit me to enter upon that this evening.

[1] Hall v. Potter (which is also reported in 1 Eq. Ca. Ab. 89, and 3 P. Wms. 76, and Shower's Parl. Cas. 76) has been followed by a numerous class of cases; Cole v. Gibson, 1 Vesey, 503; Roberts v. Roberts, 3 P. Wms. 74, see Mr. Cox's note; Smith v. Bruning, 2 Vern. 392; Duke of Hamilton v. Lord Mahon, Id. 652; Boynton v. Hubbard, 7 Mass. 112, and Lord Redesdale, when Chancellor of Ireland, declared void a bond given to the obligee as a remuneration for having assisted the elopement of the obligor without the consent of the wife's friends, though the bond was given voluntarily after the marriage, and without any previous agreement therefor; Williamson v. Gihon, 2 Sch. & Sef. 362. The civil law, however, it is well known, in its approval and encouragement of the institution of marriage, allowed the *proxenetæ*, or match-makers, to stipulate, within limits, for a reward for promoting marriages; Code, Lib. 5, tit. 1, l. 6.

[*133] *LECTURE VI.

ILLEGAL CONTRACTS—FRAUD—USURY—GAMING AND HORSE-RACING—WAGERS.

As a considerable time has intervened since the last lecture, and as it is quite necessary in order to the thorough understanding of a subject, particularly so complex a one as the present, to bear the arrangement of its parts clearly in mind, I shall commence this lecture by recapitulating the topics which I have already discussed, and pointing out how much of the subject remains to be considered.

I stated in the first lecture the general division of Contracts into Contracts *of Record*, by *specialty*, and *Simple Contracts*. I then enumerated the differences by which these classes of contract are distinguished from one another, and the peculiarities of each of them. I then touched on the practical distinction which exists between a simple contract by mere words and one reduced to writing, and the further distinction between those cases in which the adoption of a writing is optional, and those in which its adoption is rendered necessary by the provisions of some Act of Parliament, and particularly of the Statute of Frauds, in the cases [*134] to which it *applies. I then proceeded to explain the nature of the *consideration* which the law requires in order to support a simple contract, and to touch on the distinction which exists between executed and executory considerations. Then, leaving the separate consideration of simple contracts, and turning to those points which apply to all contracts whatever, I arrived, in the last lecture, at the effect of *illegality* upon the contract. I pointed out the princi-

ple upon which illegality, tainting either the consideration or the promise, is held to vitiate every description of contract, and I then stated to you the subdivision of illegal contracts into two classes; 1st, those which are so at common law; 2dly, those which are rendered so by the provision of some statute. With regard to the former of these two classes, namely, contracts illegal at common law, I explained that a contract *illegal* at common law is so on one of three grounds: 1st, that it violates the rules of morality; 2dly, that it is opposed to public policy; or, 3dly, that it is tainted by fraud.

I exemplified the first of these three classes by the case of Forres v. Jones, 4 Esp., in which the print-seller was not permitted to recover on a contract for the sale of libellous publications; and I adduced several instances of the second class of contracts illegal at common law, those which are so because opposed to public policy, in cases, namely, where the contract is in general *restraint of trade, or creates a re- [*135] straint of trade which, though not general, is unreasonable in its extent, as being larger than the protection of the person who imposes it requires. Contracts in general restraint of marriage, contracts tending to facilitate the *future separation* of husband and wife, and contracts to bring about marriage for a reward, or as they are called, for *Brocage of Marriage.* There is another remarkable instance of contracts falling under this class, namely, of illegality created by the rules of common law, which it will be right to specify before proceeding to the next branch of the subject. It consists of contracts, void, because having a tendency to obstruct the administration of justice. Such was the very contract in Collins v. Blantern, 2 Wils. 341; the case which first established that the

person who has executed a deed is not estopped from showing, by way of defence, that it was so executed for an illegal consideration, although he would not have been allowed to defend himself on the ground that there was no consideration for it at all. In that case, five persons were indicted for perjury, and it was agreed that Collins, who was their friend, should buy off the prosecutor's evidence by giving him a note for 350*l.*, in consideration of which he undertook not to appear at the Assizes. And it was further agreed that, in order to indemnify Collins against the conse-
[*136] quences of his being *called upon to pay the note, Blantern should give Collins his bond conditioned for the payment of 350*l.*, the same sum for which the note was made. In an action brought upon the bond the Court of Common Pleas held that it was void, and that a plea showing the consideration on which it was given was a good answer to the action.(*a*) There is a late case of Unwin v. Leader, 1

(*a*) Agreements to indemnify persons against the consequences of illegal acts fall within this category. (Shackel v. Rosier, 2 Bing. N. C. 634, 29 E. C. L. R.)[1] So also do all promises which are made to obtain release from duress of person on illegal arrest, or under compulsion of colourable legal process, whereby it is made the instru-

[1] Mitchell v. Vance, 5 Monroe, 529; unless the illegal act is *already done*, in which case, the agreement to indemnify is no encouragement to do *future* harm; Haskett v. Tilley, 11 Modern, 93; Kneeland v. Rogers, 2 Hall (N. Y.), 587. Thus a bond given to a sheriff to indemnify him against a voluntary escape which *had* happened is valid, though if given in anticipation of such an escape it would fall within the general rule; Given v. Driggs, 1 Caines, 450; Doty v. Wilson, 14 Johnson, 381; and these cases, it will be perceived, are analogous in principle to those which, while holding to be invalid bonds executed in consideration of a *future* separation between husband and wife, yet enforce such instruments where the separation is to be immediate, or has already taken place.

M. & Gr. 747, 39 E. C. L. R., which involves the same principle. So does the case of Coppock v. Bower, 4 M. & W. 361, in which an agreement to withdraw an election petition in consideration of a sum of money was held void. So does *Arkwright v. Cantrell, 7 A. & E. 565, 34 E. C. L. R., where the [*137] grant of a judicial office to a person interested in the matters which would become the subjects of adjudication was held void.

The instances which I have mentioned, are those in which illegality at common law is most frequently set up for the purpose of invalidating a contract. To these must be added the third class of cases which I specified; those, namely, in which the contract is avoided on the ground of fraud; that is, deceit practised upon the contracting party in order to induce him to enter into it. This is so very well known a point, and one of such continual recurrence in practice, that it is useless to multiply examples of its application.(a) As to the *mode* in which *the defence [*138] of fraud is set up, and rebutted in a court of

ment of oppression or extortion, but not where the arrest was legal. (Smith v. Monteith, 13 M. & W. 427; see also The Duke de Cadaval v. Collins, 4 Ad. & Ell. 858, 31 E. C. L. R.; Gas Light Company v. Turner, 5 Bing. N. C. 675, 35 E. C. L. R.; and Skeate v. Beale, 11 Ad. & Ell. 983, 39 E. C. L. R.) Agreements in consideration of compounding any criminal proceedings, are void; but when they relate to offences which may be made the subject of an action as well as an indictment, agreements to pay the costs of the action on its being stopped, are valid; and also in cases of misdemeanours not of a public nature, such as assaults, &c., a defendant is permitted "to speak with the prosecutor," i. e. compound the offence, after conviction and before judgment, with the sanction of the Court. (See 1 Greaves, Russell on Crimes, 132; see also Beeley v. Wingfield, 11 East, 46; and Baker v. Townshend, 7 Taunt. 422, 2 E. C. L. R.)[1]

(a) Since these Lectures were written, cases have occurred which

[1] See supra, note to page 125.

[*139] law, you may refer to Edwards v. *Brown, 1 C. & J. 307; Gale v. Williamson, 8 M. & W. 405.

give increased importance to the subject of frauds as applied to contracts. Dormant discrepancies of judicial opinion have been revived, and the law, as laid down in recent judgments, invites inquiry into the authority and principle on which it rests. Fraud consists either in the wilful misrepresentation or concealment of some material fact, by which the party defrauded was naturally misled: the question of whether the fact be or not material, is for the jury. (Lindenau v. Desborough, 8 B. & Cr. 586, 15 E. C. L. R.) A mere lie is not always legally a fraud, for if the party defrauded might, by the exercise of ordinary prudence, have detected it, it would not naturally mislead him, and he is remediless, on the principle of *vigilantibus non dormientibus succurrunt jura.* In contracts of sale these lies are of constant occurrence, the seller extolling and the buyer depreciating the article to be sold; these assertions, however, are not calculated to prevent either party from the exercise of such caution as would render them harmless; and where they do not enter into the contract itself, they do not amount to *fraud*, however *false* they may be.[1] A distinction was taken in very old cases between fraud

[1] It is in fact no more than an application of the maxim *simplex commendatio non obligat.* Thus Lord Brougham said, in delivering his judgment in the House of Lords, in the great case of Small v. Atwood, 6 Clark v. Finelly, that the inference he drew from the authorities was that "general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing; unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract. If a mere general intention to overreach were enough, I hardly know a contract, even between persons of very strict morality, that could stand. We generally find the case to be, that there has been an attempt of the one party to overreach the other, and of the other to overreach the first, but that does not make void the contract." It has therefore been held, that mere general statements of what property would thereafter be worth, afforded no ground for rescission of the contract, the matter being fully within the vendee's own calculation; Donelson v. Weakley, 3 Yerger, 178, and so of any other

*We next come to that class of contracts which are void because infected with illegality, [*140]

and falsehood, which is useful in determining doubtful cases, namely, between statements of facts which are peculiarly within the knowledge of the party making them, and such as are equally ascertainable by either party. In Leakins v. Clissel, Siderfin, 146 (temp. 15 Car. II.), we find this distinction drawn between the statement that houses are *worth* so much, and that they *let* for so much, the one being matter of *opinion*, the other of *fact*. (See also 1 Rolle's Abr. 91). In Risney v. Selby, 1 Salk. 211 (temp. 3 Ann.), under similar circumstances it was contended that the "plaintiff was over credulous in taking the defendant's word for it, but the plaintiff had his judgment; for the value of the rent is matter that lies *in the private knowledge* of the landlord and his tenant, and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it." (See also Bailey v. Merrel, 3 Bulstr. 94; Pilmore v. Hood, 5 Bing. N. C. 97, 35 E. C. L. R.)

Another very important point in the requirements of fraud is the vexed question whether there can be legal fraud without moral fraud; whether the fraud must have been intentional in order to give a remedy to the party thereby defrauded? And the question has commonly turned upon the fact whether the person making the statement did or did not know of its falsehood; in other words, whether,

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general representation, open to examination; Stray v. Peters, 2 Root; Bell v. Henderson, 6 Howard (Miss.), 311; Anderson v. Hill, 12 Sm. & Mar. 683; Taylor v. Fleet, 4 Barbour's S. C. R. 95. Foley v. Cowgill, 5 Blackford, 18. But it must also be observed, that although the subject of the false statement may be one within the vendee's own range of inquiry, yet if the statement is designedly made in order to prevent such inquiry, the rule is otherwise. Thus in Dobell v. Stevens, 3 Barn. & Cres. 623, 10 E. C. L. R., in the negotiation of the sale of the lease and good-will of a public house, a false representation was made by the vendor with respect to the quantity of beer drawn during a certain period. The books were in the house, and it was part of the defendant's case that the plaintiff might have had access to them, but, notwithstanding that fact, the Court of King's Bench held that an action for damages, might, under such circumstances be sustained, and the same principle will be found applied in the case of Hunt v. Moore, 2 Barr, 107; Napier v. Elam, 6 Yerger, 108; Campbell v. Whittingham, 5 J. J. Marsh. 96, Buford v. Caldwell, 3 Missouri, 477.

[*141] existing *not by the rules of Common Law, but under the express provisions of some statute.

in order to maintain an action for the misrepresentation or fraud, it be necessary to aver and prove the scienter. Of course, the question alone applies to cases where the representation is *not* embodied in the contract, as in cases of warranty; where the party guarantees for the truth of his statement; in which case his knowledge of its falsehood is perfectly immaterial, as he expressly guarantees its truth; and the gravamen is the breach of warranty, and not the deceit. (See Budd v. Fairmaner, 8 Bing. 52, 21 E. C. L. R., per Tindal, C. J.; and Williamson v. Alison, 2 East, 466.) The question arises in all cases of implied, but not of express warranties. It is nowise affected by the fact that the misrepresentation was made by an agent or third party instead of the principal, the right to bring the action, whether against the agent or the principal, for the misrepresentation, depends on precisely the same principles (see Ormrod v. Huth, 14 M. & W. 662, per Tindal, C. J.), and involves the same question, whether the scienter is essential or not. The question also equally arises in respect of what is necessary to support actions in tort, for the misrepresentation, and in respect of what is necessary to support the plea of fraud in defences to actions of debt or assumpsit.

So wide is the range of cases, therefore, which involves this point, and so materially does it affect commercial interests, that it is requisite that the subject be noticed, and the leading authorities in conflict upon it cited here, especially with reference to recent decisions in the Exchequer Chamber.

There is no question that at first moral fraud was essential to the original writ of "disceit:" it, in fact, contained the words "*fraudulente et maliciose.*" (Fitz. Nat. Brev. p. 95, ed. 1635; see also Dyall's Case, Cro. Eliz. 44.) The earliest doubt on record appears to have occurred in the case of Chandelor v. Lopus, Croke Jac. 4. The defendant sold to the plaintiff a stone, which he affirmed to be a bezoar stone, when it was not; and it was held that the bare affirmation that it was a bezoar stone, without warranting it be so, was no cause of action. It is also there said, that "although he knew it to be no bezoar stone, it is not material;" and Anderson, J., held that the mere selling of the stone as a bezoar stone without warranty was actionable.[1] Buller's "Nisi Prius" expressly maintains the necessity

[1] It should be recollected of this leading case (which has been often misunderstood), that the decision turned simply upon the insufficiency

*Now with regard to this class I need hardly say that no contract prohibited by the *express* [*142]

of the scienter, (p. 30, 1st edit.) In 1778 we find Ld. Mansfield, C. J., holding another doctrine. In the case of Pawson v. Watson, Cowp. 785, which was an action against the underwriters on a policy of assurance alleged to have been made on a false verbal representation, "If in a life policy," said Ld. Mansfield, "a man warrants another to be in good health, when he knows at the same time he is ill of a fever, that will not avoid the policy; because by the warranty he takes the risk upon himself. But if there is no warranty, and he says, 'the man is in good health,' when in fact he knows him to be ill, it is *false. So it is if he does not know whether he is well or ill;* for *it is equally false to undertake to say that which he knows nothing at all of, as to say that is true which he knows is not true.*" It is however to be observed, that Lord Mansfield refers to such misstatements as affect the interest of the party making them.

This intimation of the immateriality of the scienter is at variance with the dicta of two of the judges in the subsequent case of Pasley v. Freeman, 3 T. R. 51, where Mr. Justice Buller says, "*The fraud is that the defendant procured the plaintiffs to sell goods on credit to one whom they would* not otherwise have trusted, by asserting that which *he knew to be false;*" and Ashurst, J., says, "the *quo animo* is a great part of the gist of the action." The case itself, however, merely decided that it is not necessary to an action on the case for a deceit, that the person making the false statement should derive benefit from it, or that he should collude with the person who is benefitted: and this had been held before.

Haycroft v. Creasy, 2 East, 92 (A. D. 1801), was the first case in which the question directly arose whether the knowledge of the fraud by the defendant was essential to an action for a false statement

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of the declaration which neither contained an allegation of a warranty, nor that the defendant knew the stone not to be a Bezoar stone, and the expression quoted above, that "although he knew it to be no Bezoar stone, it is not material," was a mere dictum, and has been repeatedly denied, and the opinion of Anderson, J., which, as cited above, would seem to be part of the ruling of the case, was in fact his dissent from the opinion of the court; "But Anderson to the contrary, for the deceit in selling it for a Bezoar, whereas it was not so, is cause of action. *But, notwithstanding,* it was adjudged to be no cause, and judgment was reversed."

[*143] *provisions of a statute can be enforced in any court of law; but it is necessary that you

of the credit of a third party. Lawrence, J., held that, "in order to support the action, the representation must be made *malo animo*, and that there must be something more than misapprehension" or mistake. Leblanc, J., said, "By fraud, I understand an intention to deceive," *without which the action is not maintainable.* But Lord Kenyon says, speaking of his ruling at Nisi Prius, "it was enough to state that the case rested on this, that the defendant affirmed that to be true within his own knowledge that he did not know to be true. *This is fraudulent;* not perhaps in that sense which affixes the stain of *moral turpitude on the mind of the party, but falling within the notion of* LEGAL FRAUD, *such as is presumed in all the cases within the Statute of Frauds.* The fraud consists not in the defendant's saying that he believed the matter to be true, or that he had reason so to believe it, *but in asserting positively his knowledge of that which he did not know.*"

In Crosse v. Gardener (Carthew, 90), which was an action on the case for falsely affirming that goods were the property of the seller when they were not, it was held that the declaration was good though there was no scienter, and the party did not know that he was making a false statement. See also Rex v. Mawbey, 6 T. R. 637, where Lawrence, J., applies the same doctrine to perjuries, it being not requisite to show wilful falsehood. The same view is even more strongly expressed by Sir James Mansfield, C. J., in Schneider v. Heath, 3 Camp. 506, where he says, "*It signifies nothing whether a man represent a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false,* if in point of fact, it turns out to be false." There is also a dictum of Best, C. J., exactly to the same effect, in Adamson v. Jarvis, 4 Bing. 66: "He who affirms either *what he does not know to be true,* or knows to be false, to another's prejudice and his own gain, is, both in morality and law, guilty of falsehood, and must answer in damages."

In the case of Humphreys v. Pratt, 5 Bligh, N. S. 154, the defendant had represented to the plaintiff, a sheriff, that a judgment debtor was possessed of certain goods liable to be seized under the writ. The sheriff seized accordingly, but the goods proved not to be liable to be seized under the writ; and the declaration alleged that the defendant then and there deceived and defrauded the plaintiff in this, that the said goods and chattels were not the property of the

*should also bear in mind that an *implied* prohibition is equally fatal to its validity. [*144]

judgment debtor. Upon this state of the record, the House of Lords held that the plaintiff below was entitled to retain his judgment, notwithstanding the declaration did not allege that the defendant below knew his representation to be untrue. [No reasons were given, but the reporter was privately informed by Lord Tenterden, that the case was put upon the ground of the sheriff being a public officer, and placed between two fires; but see Collins v. Evans, infra.]

Railton v. Matthews, 10 Cl. & Fin. 934, is a decision based on the same principle with the doctrines we have just cited. It was also on appeal to the House of Lords. The respondents had not communicated certain facts affecting an agent's credit to the plaintiff, who became his co-surety in a bond to the respondents, without any communication with them, and it proved that they, the respondents, knew facts materially affecting the credit of the agent; and in the course of the judgment Lord Cottenham said, "In my opinion there may be a case of improper concealment, or non-communication of facts, which ought to be communicated, which would affect the situation of the parties, *even if it was not wilful and intentional, and with a view to the advantage the parties were to receive.*"

The same principle has always been held good in policies of assurance where the mere averment that the defendant made a false statement suffices, though he made it believing it to be true. See Goram v. Sweeting, 2 Saund. 199, and cases there cited.

The mere concealment or non-communication of material facts has been held to vitiate a contract in ordinary cases of sale on agreement. See Hodgson v. Richardson, 1 Wm. Bl. 465, per Yates, J., who says, "The concealment of material circumstances vitiates *all* contracts, upon principles of natural law." (See also Pilmore v. Hood, 5 B. N. C. 97, 35 E. C. L. R.)

In Cornfoot v. Fowke, 6 M. & W. 358, Lord Abinger, C. B., was at issue with the rest of the Court on a point which involved the same distinction. The question arose on a plea of fraud and covin to an action for the rent of a house, which the agent of the plaintiff had assured the defendant there was no objection to. The plaintiff, the landlord, however, well knew that there was a grave objection to the house, of which he made no mention to his agent, and the agent was wholly ignorant of such objection when he made the false statement alleged in the plea. Mr. Baron Parke said, "It is, I think

[*145] *"Where a contract," says Lord Tenterden, in Wetherell v. Jones, "is *expressly* or by *im-*

justly said, *that it is not enough to support the plea that the representation is untrue; it must be proved to have been fraudulently made.* As this representation is not embodied in the contract itself, the contract cannot be affected unless it be a fraudulent representation, and that is the principle on which the plea is founded. Now the simple facts that the plaintiff knew of the existence of the nuisance, and that the agent, who did not know of it, represented that it did not exist, are not enough to constitute fraud; each person is innocent, because the plaintiff makes no false representation; and the agent, though he makes one, does not know it to be false; and it seems to me to be an untenable proposition, that if each be innocent, the act of either or both can be a fraud."

Lord Abinger, C. B., on the other hand, having cited the case of Williamson v. Allison, 2 East, 446, and Hodson v. Richardson, 1 Wm. Bl. 463, held that "nothing is more certain than that the concealment or misrepresentation, whether by principal or agent, by design or by mistake, of a material fact, *however innocently made*, avoids the contract on the ground of a legal fraud. But though I consider this case as coming fully within the meaning of a legal fraud, even if the agent is presumed to be ignorant of the falsehood of his misrepresentation, I am very far from conceding that it is a case void of all moral turpitude." The majority of the court, however, held with Mr. Baron Parke, and gave judgment accordingly.

Nevertheless, the Court of Exchequer held a different doctrine in the subsequent case of Smout v. Ilbery, 10 M. & W. 1. A widow had ordered goods on the assumption that her husband, who had sailed for China, was alive, at a time when she could not have heard of his death. The question arose whether, by the order she gave for meat in her husband's name, she did not impliedly undertake that he was alive, and thus become liable for the constructive misrepresentation.

The court took time to consider, and in an elaborate judgment, delivered by Alderson, B., entered upon an exposition of the law as to fraudulent misrepresentations, and having classified the different modes in which they arise, said, "there is a third class, in which the courts have held that where a party making the contract as agent *bona fide* believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases, *it is true the agent is not actuated by any fraudulent motives, nor has he made any statement which he knows to be untrue. But still his*

plication *forbidden, no court will lend its assistance to give it effect." The examples which [*146]

liability depends on the same principles as before. It is a wrong, differing only in degree, *but not in its essence*, from the former case, to state as true what the individual making such statement does not know to be true, *even though he does not know it to be false*, but believes without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertions, it is equally just that he who makes such assertion should be personally liable for its consequences."

This case was immediately followed in the same court by that of Moens v. Heyworth, 10 M. & W. 147, and by Taylor v. Ashton, 11 M. & W. 401, where the old doctrine was resumed and the scienter held to be essential! The misrepresentation in the latter case consisted in the report of a Joint Stock Banking Company, which represented itself in a prosperous condition, and an action upon the case was brought, charging fraudulent misrepresentation and statements known by them to be untrue against the defendants by the plaintiff, who had been thereby induced to take shares. The jury found the defendants not guilty of the charge laid in the declaration, but guilty of gross negligence. Upon this the same question arose which forms the subject of the judgment in Smout v. Ilbery,—whether a falsehood, which misleads and injures, without fraud, is actionable? And the Court held, after *Cur. adv. vult.*, that moral fraud was essential to the action. The judgment states that "the jury found the defendants not guilty, but at the same time said they begged to express their opinion that the defendants had been guilty of *gross negligence;* and it is insisted that even that, accompanied with damage to the plaintiff, in consequence of that gross negligence, would be sufficient to give him a right of action. FROM THIS PROPOSITION WE ENTIRELY DISSENT, *because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be fraudulently made.*" According, therefore, to the judgment in Smout v. Ilbery, liability exists where there is no moral fraud at all; and in Taylor v. Ashton, moral fraud is made indispensable to liability. In Polhill v. Walter, 3 B. & Ad. 114, 23 E. C. L. R. (1832), where the defendant had accepted a bill *per proc.*, knowing that he had no authority to do so, but believing that the acceptance would be ratified, the Court held

[*149] upon the person *doing it. In such cases the imposition of the penalty is invariably held to

been done with his connivance, or he may have detected it without there being any possibility of proving it. The inconvenience amounting to impracticability of testing actual knowledge of fraud committed, is a strong reason for not requiring proof of it.

But the strongest reason of all is, that the purchaser, where he cannot prove the *animus* of the party who made the false statement, is wholly remediless in cases like that of Ormrod v. Huth; for after acceptance he has lost the power of repudiating the contract, whereas the vendor would have his remedy in most cases against the party who sold to him and perpetrated the original fraud, and who must have done so knowingly. It is difficult, moreover, to distinguish on principle between the injury done in such cases and those of ordinary negligence, where the injured party has his action without proving any intent to injure. If a man is defrauded by the negligent statement of another, he is surely as much entitled to a remedy, without proving *intent* to defraud, as he who is injured by the negligent act of another without proving the intent to injure. The intent is no more important in one case than the other. What is the difference between acts and statements producing like results? Is there not also risk, lest by giving an irresponsibility to false statements we engender an indifference to truth, and lessen the reliance of merchants on the integrity of statements which necessarily form the basis of half the business of commerce? It is at any rate well to inquire, whether to hold that no man is liable for the results of his false statements unless he be proved to have known their falsehood, is not to attach a virtue to ignorance and a protection to carelessness alike foreign to social economy and the ethics of jurisprudence. On these grounds it cannot but be a question whether the decisions of the Courts, thus strangely at variance with themselves and with the opinions of so many of their Chiefs—and it would appear equally so with that of the House of Lords itself—are to be deemed law, and that proof of moral fraud is requisite to constitute fraud in law,—or whether the broader doctrine thus embodied by Lord Kenyon in his memorable judgment in the case of Haycraft v. Creasy be not the sounder rule:—"If any become an actor in deceiving another—*if he lead him by* ANY *misrepresentations to do acts which are injurious to him, I learn from all religious, moral, and social duties, that such an action will lie against him to answer in damages for his acts.* And when I am called to point out legal authorities for this opinion, I say that

amount to an *implied prohibition of the thing itself on the doing of which the penalty is to [*150]

this case stands on the same grounds of law and justice as the others which have been decided in this Court on the same subject."

The inquiring reader is referred for further exposition of this subject to the cases of Jones v. Bowden, 4 Taunt. 847; Parkinson v. Lee, 2 East, 314; Meyer v. Everth, 4 Camp. 22; Lysney v. Selby, 2 Ld. Ray. 1118; Langridge v. Levy, 2 M. & W. 519, and 4 M. & W. 337; Pilmore v. Hood, 5 Bing. N. C. 97, 35 E. C. L. R.; Vernon v. Keys, 12 East, 632; Adamson v. Jarvis, 4 Bing. 66, 13 E. C. L. R.; Fuller v. Wilson, 3 Q. B. 58, 43 E. C. L. R.; Chalmers v. Payne, 2 Cr. M. & R. 157; Moens v. Heyworth, 10 M. & W. 155; Freeman v. Baker, 5 B. & Ad. 797, 22 E. C. L. R.; Dobell v. Stevens, 3 B. & Cr. 623, 10 E. C. L. R.; Springfield v. Allen, 2 East, 448 n.[1]

Misrepresentations as to the credit of others, however fraudulent, must be in writing, under the 9 G. 4, c. 14, s. 6, of which see ante, p. 56. The extent to which this statute includes such representa-

[1] There certainly did exist, for a short time, upon the subject of what is sufficient to support an action for deceit, some difference of opinion between the members of the Court of Exchequer, as well as some difference of decision between the majority of that Court and the Court of Queen's Bench; but it is believed that there is no longer any difficulty as to the principles finally recognised and established in the English courts, or any material discrepancy of judgment on this side of the Atlantic, particularly if regard is paid by the student rather to the decisions themselves, than to the dicta which many of them contain.

It may, in the first place, be noticed that the quotation from Mr. Justice Story's Treatise on Equity Jurisprudence, which is deemed by the English editor, supra, to be opposed to the view taken by the majority of the Court of Exchequer, is not, when construed relatively to the subject of which that learned Judge was speaking, opposed to any authority whatever. The chapter in which it is contained, is that of "Mistake," and there can be no doubt that an "*innocent* misrepresentation by *mistake*" can never be made the foundation of a personal action for *fraud*, however it may operate on the contract itself. It may annul the contract, on the ground that "a substantial error between the parties concerning the subject-matter of the contract destroys the consent necessary to its validity" (2 Kent's Com. 471), and in this application the text referred to is to be regarded, for the

accrue. In Bartlett v. Viner, Carthew, 252, which is always referred to as a standard authority on this

tions is decided in Haslock v. Ferguson, 7 A. & E. 86, 34 E. C. L. R.; and Swann v. Phillips, 8 A. & E. 457, 35 E. C. L. R.

There are various other cases in which contracts may be avoided on

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heads of fraud and mistake are, both in courts of law and equity, as distinct as those of tort and contract.

It was said, in perhaps the most recent English case on this subject (Watson v. Poulson, 7 Eng. Law & Eq. R. 588), that "the telling an untruth, knowing it to be an untruth, with intent to induce a man to alter his condition, and his altering his condition in consequence, whereby he sustains damage, fulfil all the requisites to support an action for deceit." The question then arises, how much *less*, if anything, than this, will be sufficient for that purpose.

The recent cases in England (of Collins v. Evans, 5 Q. B. 120, 48 E. C. L. R.; Moens v. Heyworth, 10 M. & W. 147; Taylor v. Ashton, 11 Id. 401; and Ormrod v. Huth, 14 Id. 651, the doctrine of which cases was approved in the Exchequer Chamber, in Barley v. Walford, 9 Q. B. 197, 58 E. C. L. R.), have now decisively settled, in accordance with reason and previous authority, that in order to support an action on the case for fraudulent representations, it is not sufficient to show that a party made statements which he did not know to be true, and which were in fact false. Thus, in Evans v. Collins (when in the Court of Queen's Bench), the defendants having pleaded that they had reasonable and probable cause to believe, and did believe their representation to be true, viz., as to the identity of a particular person who was to be arrested on a *capias*, the jury found for them on that plea, and when the court (which in the previous case of Fuller v. Wilson, 3 Q. B. 58 (reversed in the Exchequer Chamber, on another point in Id. 68, 1009), had taken a different view from that entertained by the majority of the Court of Exchequer) entered judgment for the plaintiffs, *non obstante veredicto*, that judgment was reversed by the Exchequer Chamber, which held that the verdict on the issue raised by that plea was material; and the propriety of the reversal seems to have been, in the recent case of Barley v. Walford, 9 Q. B. 206, 58 E. C. L. R., acquiesced in by Lord Denman, who had delivered the opinion which was reversed. "We must admit," said he, "the reasonableness of the doctrine there at length laid down. For if every untrue statement which produces danger to another, would found an action at law, a man might sue his neighbour for any mode

subject, the L. C. J. Holt says, "Every contract made for or about any matter or thing which is prohibited

the score of fraud; as, for instance, all fraudulent preferences or arrangements with bankrupts, which defraud the body of the creditors.

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of communicating erroneous information, such, for example, as having a conspicuous clock too slow, since the plaintiff might be thereby prevented from attending to some duty or acquiring some benefit. A doctrine creating legal responsibility in cases so numerous and so free from blame, must be restrained within some limits." Hence the result of these authorities is, that in order to make a party liable on the ground of fraud, there must be fraud as distinguished from mere mistake, and to such a conclusion the reason and weight of American authority also tends; Russell v. Clark, 7 Cranch, 69; Young v. Cavell, 8 Johns. 25; Hammatt v. Emerson, 27 Maine, 309; Weeks v. Burton, 7 Vermont, 67; Ewings v. Calhoun, Id. 79; Lord v. Colley, 6 New Hampshire, 99; Allen v. Addington, 7 Wendell, 10; S. C. 11 Id. 375; Tryon v. Whitemarsh, 1 Metcalf, 1; Ball v. Sively, 1 Dana, 370; Smith v. Babcock, 2 Woodbury & Minot, 246; and in a recent case, which has appeared while these sheets are going through the press, the Supreme Court of the United States have distinctly affirmed the same doctrine, after most of the late English decisions referred to had been cited in argument. "The gist of the action," said the court, "is fraud in the defendants, and damage to the plaintiff. Fraud means an intention to deceive. If there was no such intention, if the party honestly stated his own opinion, believing, at the time, that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue;" Lord et al. v. Goddard, 13 Howard, 198–211.

The position of a defendant may however be such, that without the utterance of what is known to him to be an actual falsehood, he may still be liable in an action for deceit, viz., where he states material facts *as of his own knowledge* (and not as mere matter of opinion or general assertion), about which he has *no knowledge whatever*. Here it is held that this direct wilful statement, in ignorance of the truth, is the same as the statement of a known falsehood, and will constitute a scienter; Hazard v. Irwin, 18 Pick, 96; Lobdell v. Baker, 1 Metcalf, 193, S. C. 3 Id. 469; Stone v. Denning, 4 Id. 158; Medley v. Watson, 6 Id. 247; Daniel v. Mitchell, 1 Story, 172; Dogget v. Emerson, 3 Id. 700; Mason v. Crosby, 1 Wood. & Min. 342; Tuthill v. Babcock, Id. 298; Hammett v. Emerson, 27 Maine, 308; Gough v. St. John, 16 Wend. 646; Thomas v. M'Cann, 4 B. Monroe, 601;

and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but

(See Alsager v. Spalding, 4 Bing. N. C. 407, 33 E. C. L. R.; Reay v. White, 1 C. & Mee. 748; Butten v. Hughes, 5 Bing. 460, 15 E.

Buford v. Caldwell, 3 Missouri, 477; Lockridge v. Foster, 4 Scammon, 570; M'Cormick v. Malin, 5 Blackford, 509; Joice v. Saylor, 6 Gill & Johns. 54; Munroe v. Pritchett, 16 Alabama, 485.

Such a course of decision perfectly accords with the remark of Judge Story, cited by the English editor, that "the affirmation of what one *does not know or believe to be true*, is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false;" while it is not at all inconsistent with the language quoted from Ormrod v. Huth, that "if the representation was honestly made, and *believed at the time to be true*, by the party making it, although not true in point of fact, it is not a fraudulent representation." The question of good faith is one, upon the evidence, for the jury; Lord v. Colley, 6 New Hamp. 99; Bokee v. Walker, 2 Harris, 139; and the plaintiff can recover, either by showing the positive statement and the defendant's knowledge of its falsity, or by showing the positive statement, and proving that the defendant had not, and could not have had any knowledge in the matter. Either of these presents a case of moral fraud, and both of them are very different from that of a statement, false indeed in fact, yet honestly believed to be true.

It would seem, however, that even in the latter case, there is no principle of law which forbids a defendant being made liable, in an action on the case for *negligence*, which entirely meets the objection entertained by the English editor to the course adopted by the latest English decisions. Had the declaration in Taylor v. Ashton, supra, been framed with this view, the plaintiffs might, upon the verdict of the jury, have recovered. But, *volenti non fit injuria*, and if the purchaser knew the exact situation of the subject of the representation at the time it was made to him, he cannot, of course, recover damages on the ground of having been deceived by it.

Between the *allegatio falsi* and the *suppressio veri*, there is only this distinction, that the non-disclosure, in order to constitute fraud, must be of facts which the seller was under an obligation to disclose; 1 Story's Eq. § 207. Thus, where provisions are sold for home consumption, which are known by the seller to be unsound, he will be liable for a deceit, upon proof of his knowledge, independently of any representation made by him; Van Bracklin v. Fonda, 12 Johns. 468; Emerson v. Brigham, 10 Mass. 119; and it may be said in

only inflicts a penalty on the offender; because a

C. L. R.; Tabram v. Freeman, 4 B. & Ad. 887, 24 E. C. L. R.) So are all contracts in writing which have been altered by a party interested in them. (Master v. Miller, 4 T. R. 320.) See supra. Contracts made by persons who have been induced to enter into them when intoxicated or imbecile in mind are also voidable for fraud. See Gore v. Gibson, 13 M. & W. 623.[1] Contracts made under some delusion known by the party who benefitted by it, and to the prejudice of the party labouring under it, are fraudulent and voidable. (Hill v. Gray, 1 Stark. 434, 2 E. C. L. R.) Sureties are released on the ground of fraud from their obligation wherever with the knowledge of the creditor, any material part of the transaction between him and the debtor be withheld from the knowledge of the surety, or any secret arrangement has taken place whereby his liability is increased. Stone v. Compton, 5 Bing. N. C. 142, 35 E. C. L. R.

It is at the option of the party defrauded whether a contract tainted with fraud shall be voided or not. Steel v. Brown, 1 Taunt. 381. Deady v. Harrison, 1 Stark. 60, 2 E. C. L. R.; Chit. Plead. 6th edit. 480.

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general, that any course of dealing calculated to create a false impression on the purchaser, will amount to a fraud; Misner v. Granger, 4 Gilman, 69; Young v. Burnham, 1 Freeman's Ch. 241; Bean v. Herrick, 3 Fairfield, 262; Early v. Garrett, 9 Barn. & Cress. 928; as where the seller should state facts which were true in themselves, but so expressed as to give the idea that they conveyed the whole truth, while a material fact is kept back; Allen v. Addington, 7 Wendell, 10 S. C. 11 Id. 75; Kidney v. Stoddart, 7 Metcalf, 252.

In Lord St. Leonard's latest original work, "The Law of Property as administered in the House of Lords," will be found collected the late important cases before that tribunal as to the rescission of executed contracts of real estate on the ground of fraud. These are also noticed, together with the American cases on the same subject, in Rawle on Covenants for Title, ch. xiii., while to the American annotations to Chandelor v. Lopus, 1 Smith's Lead. Cases, 211, and Pasley v. Freeman, 2 Id. 146, the student may be profitably referred upon the more immediate subject of which this note has attempted to treat.

[1] The student will find the authorities upon the subject of contracts voidable in equity by reason of undue influence, in the notes to the case of Huguenin v. Baseley, 2 White & Tudor's Eq. Cases, 37–75. Those upon the subject of drunkenness are referred to infra.

[*151] penalty implies a *prohibition, though there are no prohibitory words in the statute." You will find this principle cited and acted on in De Begnis v. Armstead, 10 Bingh. 107, 25 E. C. L. R.; and Fergusson v. Norman, 5 Bing. W. C. 76, 25 E. C. L. R.[1] Now then, this being the general principle upon which all cases of statutable illegality depend,

It is necessary that you should bear in mind a practical distinction which exists between this class of contracts—contracts, I mean, forbidden by the *express* or *implied* enactment of some statute—and another class, in which the *contract* itself does not violate the statute, but some *incidental illegality* occurs in carrying it into effect. In these latter cases the contract is good, and may be made the subject-matter of an action, notwithstanding the breach of the law which has occurred in carrying it into effect.

The best mode of explaining this is by an example. In Wetherell v. Jones, 3 B. & Ad. 221, 23 E. C. L. R., a rectifier of spirits brought an action against a confectioner to recover the price of spirits sold and delivered to him. The defence relied upon was illegality. It appears that, under the Excise Acts, a rectifier or distiller, when he sends out spirits, is bound to send with them a permit truly specifying their strength. The plaintiff had sent a permit, but it did not specify the true strength: and the defendant relied on this

[1] In the first of these cases it was held that the plaintiff being a participant with the defendant in carrying on an unlicensed theatre, could not recover money paid him at defendant's request in its management, and in the second of them, that a pawnbroker who, in advancing money, omitted to make, in his books, the entries prescribed by a statute of Geo. 3, under a penalty for the omission, acquired no property in the pledges and had no lien on them, as against the assignees in bankruptcy of the pawner.

violation of the statute as an avoidance of *the sale. But the Court held, that the illegality [*152] was not in the contract to sell the spirits, but in the subsequent act of removing them without a proper permit, and, therefore, that an action was maintainable upon the contract; and Lord Tenterden's judgment sets the distinction in a very clear light:

"We are of opinion," said his Lordship, "that the irregularity of the permit, though it arises from the plaintiff's own fault, and is a violation of the law by him, does not deprive him of the right of suing upon a contract which is *in itself* perfectly legal; there having been no agreement, express or implied, in that contract that the law should be violated by such improper delivery. Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no court will lend its assistance to give it effect; and there are numerous cases in the books in which an action on a contract has failed because either the consideration for the promise or the act to be done was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law not contemplated in the contract by the performance of something to be done on his part." (See also Pellecat v. Angell, 3 C. M. & R. 311; R. v. Inhabitants of Somerby, 9 A. & E. 311, 36 E. C. L. R.)(*a*)

With regard to the distinction of which I have been speaking, I will make but one further observation, namely, that it would apply to cases of common law as well as statutable illegality: but I have spoken of it under the head of *statutable illegality, because [*153] I do not remember any decided case arising upon a question as to illegality at common law which would aptly illustrate it. I can, however, put such a case without difficulty. Suppose, for instance, A.

(*a*) And Fergusson v. Norman, 5 Bing. N. C. 76, 35 E. C. L. R., per Tindal, C. J.

employs a builder to repair the front of his house, and B., in so doing, erects an indictable nuisance in the public street, still, as the contract to repair the house is legal, and the erection of the nuisance in so doing was not contemplated by the agreement, the builder might recover for the repairs which he had executed. But it would be otherwise if it had been made part of the agreement, that the repairs should be performed by means of the erection of the nuisance; for there, the illegality would have entered into and formed part of the contract.[1]

[1] The cases upon this subject seem to require a somewhat fuller notice. In Rex v. Somerby, cited by the lecturer, a pauper apprentice was moved, by reason of illness, from the parish of Melton Mowbray, to that of Somerby, where he resided forty days, during which time he was employed in selling lottery tickets, and it was held that he had gained a settlement in the latter parish, notwithstanding the unlawful act in which he had been engaged; though it was suggested that if the master and apprentice had conspired together, and moved thither for that purpose, the case might have been different, and this decision is perfectly reconcilable with principle and with all the authorities. But in Pellecat v. Angell it was held that a foreigner selling and delivering goods to a British subject could recover their price, although he knew at the time of sale that the buyer intended to smuggle them into England, and the decision (which was in accordance with the previous case of Hodgson v. Temple, 5 Taunton, 181, except that that case went farther, both parties being English), to some extent, was rested on the distinction taken in Biggs v. Lawrence, 3 Term, 454, between merely knowing of the illegal act, and being a party thereto. That case decided that where a smuggler bought brandy in Guernsey, and the vendor packed it in ankers in preparation for smuggling, he could not recover the price of it, because he was aiding in the breach of the revenue laws, while in Holman v. Johnson, Cowper, 342, where the vendor, a foreigner, knew of, but did not actively participate in the smuggling, he was held entitled to recover. Lord Abinger, however, in delivering the opinion in Pellecat v. Angell, did not rely wholly on this distinction between mere knowledge and participation, but to a great extent based his opinion upon the fact of the law which was infringed, being a foreign

Now such being the fact of illegality created by statute, in avoiding an agreement tainted with it, and

one to the plaintiff. "It is perfectly clear," said he, "that where parties enter into a contract to contravene the laws of their own country, such a contract is void; but it is equally clear, from a long series of cases, that the subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this, except indeed that when he comes within the act of breaking them himself, he cannot recover here the fruits of that illegal act. But there is nothing illegal in merely knowing that the goods he sells are to be disposed of in contravention of the fiscal laws of another country." Such a course of reasoning has been, however, seriously questioned by Mr. Justice Story in his treatise on the Conflict of Laws (§ 254, note), who asks, if a Frenchman could be allowed to recover, in England, the price of poison sold in France for the avowed purpose of poisoning the Queen. But it may be remarked of the English cases that for some time, and until a very recent period, contracts connected with a violation of the *revenue* laws, were rather less severely construed, than those in violation of other statutory provisions (see some of the cases, supra, note to page *15), and Pellecat v. Angel, which was decided in 1835, may, so far as concerns the above reasons for the decision, be classed with these cases.

But upon the other ground, the line of distinction between knowledge and participation, or rather between what is and what is not participation, is at times a difficult one, and it is certain that the older cases have sanctioned recoveries in instances where they would now perhaps be denied. Thus, in Faikney v. Reynous, 4 Burrow, 2069, the plaintiff and one Richardson were jointly concerned in transactions forbidden by the act "to prevent the infamous practice of stockjobbing" (7 Geo. 2, c. 8), and the plaintiff having paid the whole of the loss sustained by the failure of the operation, the Court (Lord Mansfield, Ch. J.) held that a suit could be maintained upon a bond given to the plaintiff by the defendants to secure the repayment of Richardson's proportion of the loss, as the illegality did not enter into this new transaction; and in the subsequent case of Petrie v. Hannay, 3 Term, 418, the facts and the decision were the same way. So, it was formerly held that money lent to pay a gambling debt might be recovered, though the money lost could not; Robinson v. Bland, 2 Burrow, 1077; Barjeau v. Walmsley, Strange, 1249; Alcinbrook v. Hall, 2 Wilson, 300; and these cases were approved in Farmer v. Rus-

such being the distinction between illegality stipulated for,—contemplated by the contract,—and illegality

sel, 1 Bos. & Pull. 299, though the decision in that case was on a different ground, viz., that one who had received money for the use of a party engaged in an illegal contract could not defend in an action for money had and received on the ground of illegality, he being considered in the light of a stakeholder (as to which see infra). But a class of cases soon followed, in which the authority of Faikney v. Reynous, and Petrie v. Hannay, was sometimes distinguished, but more frequently questioned; Booth v. Hodgson, 6 Term, 405; Lightfoot v. Tennant, 1 Bos. & Pull. 551 (where Eyre, Ch. J., put the case of a druggist who should sell arsenic to one who he knew was going to poison his wife with it); Aubert v. Maze, Id. 371, Eldon, Ch. J.; Langton v. Hughes, 1 Maule & Selw. 593 (where it was held that one who sold drugs to a brewer, knowing that he would use them to adulterate ale with, contrary to a statute, could not recover, though it was not proved that they had been so used); Webb v. Brook, 3 Taunton, 12; Ex parte Mather, 3 Vesey, 373; Ex parte Daniel, 14 Id. 192; Gas Light Co. v. Turner, 6 Bing. N. C.; and in Cannan v. Bryce, 3 Barn. & Ald. 179, two partners entered into an illegal stockjobbing transaction, by which a heavy loss was sustained, which was paid by a sum of money lent them by Bryce, the defendant, who, as the jury found, was not a partner in the stockjobbing transaction. In consideration of this loan, which had been only secured by a bond, one of the partners assigned to the defendant three cargoes of vessels, and soon after, a commission of bankruptcy issued against both of them, and the assignees in bankruptcy were held entitled to recover the proceeds of these cargoes from the defendant. "If," said Abbott, Ch. J., who delivered the opinion of the Court, "the defendant acted unlawfully in lending his money to the bankrupts, he could not have sued them for recovery of payment, because no suit can be maintained upon an unlawful act; and if recovery could not be enforced at law upon the contract of lending, neither could recovery be enforced upon a bond given for the performance of that contract;" nor, consequently, upon the assignments which were to secure the bond; and in M'Kinnell v. Robinson, 3 Mees. & Wels. 435, this case was approved, and it was held, in opposition to Alcinbrook v. Hall, that money lent to play hazard with could not be recovered back.

On this side of the Atlantic, the authority of the older and overruled English cases has, however, been in many instances recog-

occurring incidentally during the course of its performance, I will proceed, as I did when speaking of illegality

nised and affirmed. Thus in Carson v. Rambert, 2 Bay, 360, it was held (on the authority of Robinson v. Bland), that the value of a horse lent to stake at a gaming table could be recovered by the lender, from the borrower. But the principal case is perhaps Armstrong v. Toler, 2 Wash. C. C. R., and 11 Wheaton, 258, where Armstrong and others contrived, during the war, a plan to smuggle into the country goods consigned to Toler, and on their seizure at the port of destination, Toler became security to the government to abide the event of the suit, and delivered to Armstrong his proportion of the goods on his promise of repayment, in case they should eventually be condemned. The goods were condemned, and Toler paid the amount of their appraised value, and in a suit brought by him against Armstrong, it was objected that the contract was void, as founded on an illegal consideration; but the court below charged that the subsequent independent contract, founded on a new consideration (viz., that of the delivery of the goods to Armstrong), was not contaminated by the illegal importation, although it was known to Toler when the contract was made, *provided* the latter had no interest and participation in the importation, and this was left as a fact to the jury, who found that he had no such participation, and the judgment entered on the verdict was affirmed on error, upon the authority of Faikney v. Reynous, and Petrie v. Hannay; and to the same effect are Smith v. Barstow, 2 Dougl. (Mich.) 163; Leavitt v. Blatchford, 5 Barb. S. C. Rep. 9; Hook v. Gray, 6 Id. 398; Thomas v. Brady, 10 Barr, 169; Phalen v. Clark, 19 Connect. 432 (some of which cases also recognised as authority those of Faikney v. Reynous, and Petrie v. Hannay); and in Cheney v. Duke, 10 Gill & Johns. 11, it was thought by the court to be abundantly settled that the knowledge of the vendor that the subject of the sale was to be illegally employed, could not defeat his recovery of the contract price, and in an action brought for the purchase-money of a slave, bought for the purpose of exportation contrary to a local statute, the plaintiff was, notwithstanding his knowledge of the unlawful exportation was proved, held entitled to recover, on the ground that nothing was done by him in furtherance of the illegal design.

In M'Intyre v. Parks, 3 Metcalf, 208, a mortgagee was, on the authority of Holman v. Johnson, supra, held entitled to recover, though the consideration of the mortgage was lottery tickets, whose sale was prohibited in Massachusetts, on the ground that the contract

at common law, to specify some of the instances of most ordinary practical occurrence, in which the legislature

was made in New York, where such sales are valid, and notwithstanding the mortgagee knew that they were intended to be sold in the former State, in violation of its laws, while in Scott v. Duffy, 2 Harris, 18, money lent in New Jersey to be bet upon the presidential election, was allowed to be recovered in Pennsylvania, on the ground that there was no evidence that such a bet was illegal in New Jersey. In Steele v. Curle, 4 Dana, 387, the following remarks were made upon this subject by Robertson, Ch. J., after referring to the different opinions which have been expressed:—

"We feel that it may be but proper to suggest, in passing, that we would be inclined neither to concur with, or to dissent from, the doctrine of either party, *in extenso* and *altogether*, without limitations or qualification; but should rather incline to the conclusion that, although, as we are disposed to think, a simple knowledge, by a vendor, of the fact that the vendee buys an article for the purpose or with an intention of using it in violation of a public law, or a principle of moral rectitude, may, in strong and flagrant cases, such as that supposed by Chief Justice Eyre, be a sufficient reason for withholding, from either party, the aid of the law for enforcing the contract, yet there may be cases of a lighter shade or less degree of enormity, in which the same fact might not, alone, be entitled to the same effect: and in the latter class, we would be inclined to place the beer case decided by Lord Ellenborough. And the reason why we should be disposed to make any discrimination in consequence of the colour or degree of the transgression contemplated by the buyer and merely understood by the seller, and why, also, we are inclined to agree with Chief Justice Eyre to some extent, is just because it does seem to us, that no one can sell a commodity, knowing that the buyer intends to use it for any purpose so flagitious as that of murder or treason, or other flagrant violation of the fundamental rights of man or of society, without betraying such a degree of turpitude and recklessness as to implicate him, as a voluntary and active participant in the unlawful design, and, as therefore, *quantum in illo*, willing and instigating a crime, which it is the civil duty of every citizen to oppose; and that the like knowledge alone, of the buyer's purpose of unlawful appropriation or use, would not necessarily lead to the like deduction, as to the motive or conduct of the seller, in every case of inferior degree,—as the beer case; the case of a purchase of an article with the intention of again making a fraudulent sale or use

has, by express provision, rendered particular contracts illegal.

And *first*, a contract may even now be void upon the ground of *usury;* but the scope and the effect of the usury laws have so much altered *during the last few years, that it is necessary to give you a short history of the modern enactments on that subject. [*154]

From the reign of Queen Anne down to that of William the Fourth the important statute on this subject was 12 Anne, s. 2, c. 16, which enacted that no person should take either directly or indirectly, more than 5 per cent., and that all contracts to the contrary should be void. In construing this statute, it was always held that no contract, however framed, however unlike a contract for a loan or for interest it might apparently be, would hold good if the ultimate effect of it would be to secure more than 5 per cent. interest for

of it; the case of a loan of money to a person who borrows for the purpose of re-loaning to a stranger at illegal interest; the case of a sale of merchandise by a wholesale merchant, in the regular course of his business, to one who, when he buys, intends to smuggle it into a foreign port, without paying the legal and accustomed duties; and many other cases of a similar kind, in which a citizen may be neutral without being guilty of incivism, or of any intentional participation in the unlawful design. In all such cases, it would seem to us, that in a commercial, busy, and enterprising age, the law should not attempt to establish a morality so pure, and exact, and vigilant, as that which would make it the legal duty of every seller of every vendible thing, to become a casuist or censor, so far as to make him responsible for the known motives of the buyer, and an active and guilty co-operator with him in his contemplated violation of law, of principle, or of justice."

The later English cases were, however, cited with approbation, and followed in Perkins v. Savage, 18 Wendell, 418; Branch Bank v. Crocheron, 5 Alab. 256; Wooten v. Miller, 7 Smedes & Marsh. 386, and Duncan v. Cox, 6 Blackford, 270.

the loan of money. Every conceivable means was used to evade the statute. Sometimes a transfer of stock, sometimes commission on a discount, sometimes a substitution of one contract for another, or several concurrent contracts were resorted to, but the effort of the court was in every case to strip off the external covering of form, and get at the intent and real import of the transaction, and if that were tainted with usury, the contract was held void; see Wright v. Wright, 3 B. & C. 272, 10 E. C. L. R.; Chippindale v. Thurston, M. & M. 411, 22 E. C. L. R.; Meago v. Summons, M. & M. 121; Carstairs v. Stein, 4 M. & S. 192.(*a*) I cite these cases, because, as I will *presently show [*155] you, they are still important, though the law is since altered.

Now such being the law as constituted by the statute

(*a*) A recent example of this occurred in the case of Belcher v. Vardon, 14 Law Jour. C. C. 427. A. being entitled to a lease of building ground for seventy years, and having borrowed money of B. agreed to assign the leases of the houses built on it to B., who was to underlet them to A. again at rents equivalent to 8 per cent. on the money advanced. Knight Bruce, V. C., held, however, that this was an usurious contract, within the large language of the statute of Anne, and that the transactions were void, as shifts and devices to evade the usury laws. And if the extra money be paid as a premium for the renewal of a loan at legal interest, it is equally usurious; (Wood v. Grimwood, 10 B. & Cr. 689, 21 E. C. L. R.) All sales made to colour usurious transactions are void; Hargreaves v. Hutchinson, 2 Ad. & Ell. 12, 29 E. C. L. R.; see, also, Wright v. Wheeler, 1 Camp. 165, n.; Doe d. Grimes v. Gooch, 3 B. & Ald. 664, 5 E. C. L. R.

The whole law of usury will be found fully discussed in the Earl of Chesterfield v. Jansen, 1 Wilson, 286, since which case Ld. Abinger said, in Downes v. Green, 12 M. & W. 490, that there is none "in which anything new is to be found." [The case is much better and more fully reported in 2 Vesey, 125; and see the notes to it in 1 White & Tudor's Eq. Cases, 378; see, also, Mr. Perkins's note to the 8th edition of Chitty on Contracts, p. 611.]

of Anne, the first relaxation was by stat. 3 & 4 W. 4, c. 98; that was the act renewing the Charter of the Bank of England; and it enacted, among other things in sec. 7, that bills of exchange and promissory notes, payable at or within three months after date, or not having more than three months to run, should be exempted from the usury law. And I suppose that this enactment was found beneficial, for, by a subsequent act of 1 Vict. c. 80, the three months were extended to twelve months. And by a still later act of 2 & 3 Vict. c. 37, it was enacted, "That no bill or note not having more *than twelve months to run, [*156] nor any contract for the loan or forbearance of more than 10*l.* sterling, shall be void by reason of the usury laws; provided that the act shall not extend to the loan or forbearance of money on the security of any lands, tenements, or hereditaments or any estate or interest therein." This act was only to continue in force till January 1, 1842; but by stat. 3 & 4 Vict. c. 83, it was continued to January 1, 1843; and, by 4 and 5 Vict. c. 54, to January 1, 1844.(*a*)

Now you will observe that none of these acts repeal the statute of Anne. They only exempt from its operation the cases provided for by 2 & 3 Vict. c. 37.(*b*)

(*a*) The 2 & 3 Vict. c. 37, has been annually extended, and by 8 & 9 Vict. c. 102, it has been again extended until the 1st of January, 1851.

(*b*) It has been expressly so held in Thibault q. t. v. Gibson, 12 M. & W. 88. It follows that in pleading it is sufficient to declare in all remaining cases of usury on the statute of Anne, and it is for the defendant to plead that the case is within one of the subsequent statutes exempting it from the old law. Lord Abinger, C. B., thus stated the rule of pleading in all actions for the recovery of penalties where there are exemptions. "In all cases where proceedings are taken against a party for the recovery of a penalty under a statute, if there be any exemption in the clause which gives the penalty, ex-

[*157] And that statute does not *apply to loans of money *under* 10*l.*, nor cases of *loans on the security of real property*, mortgages, for instances, which are therefore still governed by the statute of Anne, and will be void if more than 5 per cent. be directly or indirectly reserved by way of interest. You will now see why I thought it proper to cite cases on the construction of the statute of Anne. If you wish to inquire further regarding that act, see notes to Ferrall v. Shaen, 1 Wms. Saund. 294.(*a*)[1]

empting certain cases from its operation, the declaration or information must show that the particular case is not within the exception. But where it comes by way of proviso in a subsequent part of the act, it is not necessary to notice it in the declaration or information, but it is matter which the defendant must allege as a ground of defence. The same rule applies with increased force and efficacy to the case where penalties are given by one statute, and particular cases are, by a subsequent statute, exempted from its operation."

(*a*) The proviso at the end of section 1, that "nothing herein contained shall extend to the loan or forbearance of money upon security of any lands, &c., or any estate or interest therein," has been held to apply to *all* collateral securities and equitable mortgages, whether of freehold or leasehold property; Hodgkinson v. Wyatt, 4 Q. B. 749, 45 E. C. L. R. But this must be taken with some limitation, for it was decided in the previous month by the Court of Exchequer, that where a promissory note was given and discounted *bona fide*, a mortgage of land given as a collateral security to protect it is equally valid; Doe d. Haughton v. King, 11 M. & W. 33. The distinction between these cases, if any, seems to be that, according to the latter, the jury must find that "the real object of the parties was the discounting of the note, and that being legal, it rendered the security by mortgage also legal." [See the recent case of Nixon v. Phillips, 8 Eng. Law & Eq. R. 531.]

In the former cases the deposit of the deed was named in the bond, and might, perhaps, be deemed part of the primary, rather than as the secondary security.

And it has been held that where a deposit of such deeds is made

[1] And see Clack v. Sainsbury, 8 Eng. Law & Eq. R. 408; and Nixon v. Phillips, Id. 531.

*The next example to which I shall advert [*158]
arises on the acts against gaming. These are
exceedingly complex and troublesome; but it is absolutely necessary to direct your attention to them, for questions upon them are continually occurring in practice.

The first act is that of 16 Car. 2, c. 7, s. 3, which enacts that if any one shall play at any pastime or game, by gaming or betting upon *those who [*159]
game, and shall lose more than the sum of 100*l.* on credit, he shall not be bound to pay, and any contract to do so shall be void.

The 9th Anne, c. 14 (the principal enactment),

merely as an inducement to forbear suing upon bills of exchange protected by the recent statutes, and bearing more than 5*l.* per cent. interest, such deposit does not withdraw the bills from the operation of those statutes, and they remain valid; Bell v. Coleman, 5 Jur. 974.

Previously to the 2 & 3 Vict. c. 37, and under the 7 Will. 4, and 1 Vict. c. 80, there was nothing to render it less legal to protect such a payment by security on land than in any other way. In fact, in all cases, the courts look to the substance of the agreement and the real intent of the parties; Beete v. Bidgood, 6 B. & Cr. 458, 14 E. C. L. R.

The new statutes have materially reduced the difficulties upon which the cases used to turn. It is enough to state generally, that, as before, it is still necessary that the original agreement must have been usurious to be avoided for usury: no subsequent reservation of usurious interest suffices. There must also be an actual receipt of the interest to render the offence penal, though the contract is void without it; Wood v. Grimwood, 10 B. & Cr. 679, 21 E. C. L. R.

Where a pawnbroker advanced a sum exceeding 10*l.*, at more than 5 per cent. interest, on a pledge of goods, without making an entry delivering a duplicate, in compliance with stat. 39 & 40 Geo. 3, c. 99, s. 6, it was held that the transaction was legal, inasmuch as that statute allows pawnbrokers 20 per cent., and does not apply to loans of more than 10*l.*, and that such loans are within the protection under the 2 & 3 Vict. c. 37; Pennell v. Attenborough, 4 Q. B. 868, 45 E. C. L. R.; and see Turquand v. Mosedon, 7 M. & W. 504.

provides in sect. 1, that all securities for money or any other valuable thing won by gaming or playing at cards, dice-tables, bowls, or other game whatever, or by betting on those who game, or for money lent for such gaming or betting, or lent to gamesters at the place where they are playing, shall be void.

And the second section enacts, that any person who shall at a sitting lose the sum or value of 10*l.* may recover it back again within three months; and if he do not, any other person may, together with treble the value, half for himself, and half for the poor of the parish.

Now you will observe, that under these two acts securities for money lost at gaming, or by betting on gamesters, or for money lent to them to game with, are illegal.

And you will further observe that, even if no security be given, but the loser pay in cash, still, if the sum lost amount to 10*l.*, it may be recovered back again.

You may consult, on the construction of these acts, Sigell v. Jebb, 3 Stark. 1, 14 E. C. L. R.; Brogden v. Marriott, 3 Bingh. N. C. 88, 32 E. C. L. R.; and M'Kennill v. Robinson, 3 M. & Welsb. 134.

Now a *horse-race* is a *game* within the meaning of these acts of Parliament, as you will find laid [*160] *down in Goodburn v. Marley, Str. 1159, Blaxton v. Pye, 2 Wilson, 309, and Brogden v. Marriott, 3 Bingh. N. C. 88, 32 E. C. L. R.; and therefore if the law rested upon these statutes, all losses above 10*l.* on any such race would be recoverable back by the loser, and would put the winner in danger of the penalties of the statute of Anne, and securities for the payment of any such losses would be *void*. But it was thought that horse-racing, confined

within due limits, had a tendency to improve the breed of horses, and thereby promote the interests of the country at large: acts of Parliament have therefore been passed, providing for this particular object, and excepting such races, to a certain extent, from the provision of the gaming acts. This was first done by stat. 13 Geo. 2, c. 19, which legalized matches run at Newmarket, at Black Hamilton, or for the sum of 50*l.* and upwards. But this statute imposed certain restrictions as to the weight which the horses were to carry, which it seemed expedient to repeal, and for that purpose was passed the 18 Geo. 2, c. 34, s. 11, which, after reciting the restriction of the former statute as to weights, enacts that it shall be lawful for any person to run any match, or to start and run for any plate, prize, sum of money, or other thing of the value of fifty pounds or upwards, at any weights whatever, in the same manner as if the act of the 13th of Geo. 2, had never been made.

This act, you will at once see, was made *merely to take away the restrictions with regard to weight which had been imposed by the 13th of Geo. 2; but, though that was its object, by one of those strange accidents which are so common in the history of English law, the legality of all horse-racing has come to depend upon it. [*161]

In the first section of the 13th Geo. 2, there was a very strange and unaccountable enactment. It enacted that no person should start more than one horse for the same plate; and that, if he did, all the horses entered by him except the first, should be forfeited, and recovered by information or action at the suit of a common informer. The law regarding racing, mixed up as it is with the other gaming acts, being extremely complex, this portion of it was probably forgotten, and

certainly was not universally acted upon, when suddenly, about three years ago, informations were filed for the purpose of recovering several valuable race-horses, which had been entered by their owners, along with other horses, their property, for the same stakes, in total ignorance of the prohibition of the act of Parliament.

As soon as this was represented to the legislature, it interfered for the protection of the defendants, and passed the 3 Victoria c. 5; but that Act, I presume, inadvertently, instead of repealing so much of 13 Geo. 2, as inflicted *penalties, repealed that Act altogether *so far as it related to horse-races.* [*162]

Now it has always been supposed that the legality of horse-races depended on the 13 Geo. 2, and that the 18th of the same reign was a subsidiary Act, and had merely the effect of taking off restrictions as to weight. And many persons therefore thought that the Act of 3 Vict. c. 5, instead of effecting the object of the legislature by protecting horse-races, had repealed the only enactment by which they were supported, so that they have been thrown back into the class of games comprised within the statute of Anne, and would be illegal if for a larger stake than 10*l.* At length the question arose, and was argued in a case of Evans v. Pratt, Law Jour. 1842, C. P. 87,(*a*) in which *the Court of Common Pleas decided that the words [*163]

(*a*) This case decides that a steeple-chase for 50*l.* or upwards is legal. (3 M. & Gr. 759, 42 E. C. L. R.) The judgment of Maule, J., gives the law on races as it now stands:—"I think the 11th section of the 18 Geo. 2, c. 34, is to be read thus:—'It shall be lawful for any person to run any match for 50*l.* or upwards, at any weights whatsoever, and at any place whatsoever, without incurring the penalties in the Act of 13 Geo. 2, c. 19, and without incurring any other illegality under any previous statute.' If that be the true construction of this section, the repeal of the 13 Geo. 2, c. 19, will

of the 11th sect. of the 18th Geo. 2, c. 34, were large enough to legalize all horse-races for stakes of 50*l.* and upwards. Such races are therefore legal; and it is settled by Bidmead v. Gale, 4 Bur. 2432, that a race for 25*l.* a side is a race for 50*l.*(*a*)

not have the effect of taking away the legality of any race which was legal before the passing of the repealing statute. Then the only question is, whether the eleventh section of the 18 Geo. 2, c. 34, extends to this case. As that statute is one which takes away penalties, it ought to be largely expounded. The object of the legislature throughout these enactments has been to encourage the production of a strong and powerful breed of horses; and I think that this was a race calculated to further that object. The only doubt is raised by the language held by Lord Eldon, C. J., in Whaley v. Pajot, 2 Bos. & Pull. 51. The decision in that case merely goes to this, that a race of two horses against one is not a horse-race within the meaning of the statutes. Lord Eldon is reported to have said that 'there seems to be much ground for arguing from the nature of the 16 Car. 2, & 9 Anne, that these acts ought to be construed strictly, in order to enforce the principle on which they are founded, namely, to prohibit all horse-racing, and that the 13 & 18 Geo. 2, are, from their nature, to be so construed as to encourage the breed of horses, *and to permit that species of horse-racing* only called racing *on the turf*.' Lord Eldon does not say, to permit only 'races on the turf,' but that 'species of racing.' I see nothing, however, in the acts to require so narrow a construction; and I think it is not too much to say, that the statutes extend to all races between two horses running at the same time from one point to another point. It cannot be doubted that such races were assumed to be legal when the statute of 3 & 4 Vict. c. 5, passed."

(*a*) These statutes and cases were reviewed at great length in the case of Applegarth v. Colley, 10 M. & W. 723, which decides that a horse-race for a sweepstakes of 2*l.* each is not illegal, although the total amount subscribed and run for amounted to less than 50*l.*, inasmuch as neither the statute of Charles (it being a ready money payment) nor the statute of Anne apply to a "race for a sum of money not raised by the parties themselves (that being, in truth, a wager), but given by way of prize by a third person desirous of encouraging racing." Nevertheless, it appears that the 18 Geo. 2, c. 34, still in force, renders any race run for less than 50*l.* illegal; for,

[*164] *But though a race for 50*l.* is thus legalized, a bet on such a race is not so, for the case of Shilleto v. Theed, 7 Bing. 403, 20 E. C. L. R., has decided that a person betting, even on a legal horse-race, is in the same situation as if he had betted upon any other game.(*a*)

Now there is one point not perhaps precisely forming part of, but strongly bearing on this subject, and of which I must here warn you. When I speak of the [*165] statutes of Charles and *Anne as rendering bets of a greater amount than 10*l.* recoverable back from the winner, and rendering all securities for bets void, you must understand me to speak of bets on persons gaming; for the words of the former statute are, "by playing at the games or betting on the players," and of the latter and more important one, "betting on the sides of such as game at any of the

if races run for less sums were not illegal, there could have been no reason why either the 13 Geo. 2, or the 18 Geo. 2, should legalize what was already legal. And the judgment in Evans v. Pratt fully confirms Mr. Smith's opinion that the legality of horse-racing depends on the 18 Geo. 2, c. 34 (which the 3 & 4 Vict. c. 35, does not repeal), and it expressly limits its legalizing effect to races for stakes of 50*l.* or upwards; Applegarth v. Colley is inconsistent with this view, and asserts that the statute of Charles makes such gaming only illegal as is "fraudulent and excessive," and that it has no reference to the cases of persons fairly running horses for money, or fairly betting on races or other sports of like nature.

The case of Bentinck v. Connop, 5 Q. B. 693, 48 E. C. L. R., shows that all races are illegal, under the statutes of Charles, where the stake exceeds 100*l.* and is not paid down, and it upholds the view that the legality of racing depends on the 18 Geo. 2, c. 34. Daintree v. Hutchinson, 10 M. & W. 85, decides that a dog-race is within the statute of Charles.

The stake is the aggregate of the sums subscribed; Challand v. Bray, 1 Dowl. N. S. 783.

(*a*) See next note.

aforesaid games." All wagers therefore are not affected by these statutes, but only wagers upon *games*. Now a *foot-race* is a *game* within these Acts; Lynall v. Longbotham, 2 Wils. 36.[1] So are *cards*, *dice*, *tennis*, *bowls*, for they are mentioned in the Acts; and so is *cricket*, though not specified; Hodson v. Terril, 3 Tyrw. 929; not that there is anything illegal in these amusements themselves, but that the law will not allow the winner of 10*l.* or upwards to receive or retain his winnings, nor will it allow any security for any winnings at them to be enforced. But as to wagers not made upon *games* within the meaning of these Acts of Parliament, if there be nothing illegal or opposed to public policy in the subject-matter of the wager, there is no statute which affects its validity.(*a*)

(*a*) It is otherwise now. By 8 & 9 Vict. c. 109, s. 18, "all contracts or agreements whether by parol or in writing, by way of gaming or wagering, are null and void; and no suit is to be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which may have been deposited in the hands of any person to abide the event on which any wager may have been made." But this enactment is not to apply to "any subscription or contribution, or agreement to subscribe or contribute for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

This sweeping enactment, applying to bets on races and all wagers, renders it unnecessary to enter upon the many subtle distinctions taken upon the bearing of the statute of Anne, and which will be

[1] It is, however, "a *lawful* game," within the proviso of the 18th section of the recent act of 8 & 9 Victoria, c. 109; Batty v. Marriott, 5 Com. Bench, 818, 57 E. C. L. R. The statutes of Charles and Anne, above referred to, have been to a great extent repealed and supplied by the 8 & 9 Vict., but the student will find all these enactments, together with the decisions to which they have given rise, in a late treatise, "Oliphant on Horses, Gaming, etc.," reprinted in the "Law Library."

[*166] This was decided in the *famous case of Goode v. Elliott, 3 T. R. 693, in which the wager, whether a particular person had, before a particular day, bought a wagon, was held legal, and the winner allowed to recover against the loser, in an action, by three judges contrary to the opinion of Mr. J. Buller, who advocated the view which probably would have been most consistent with sound policy, namely, that the Courts should refuse to occupy their own time and that of the public by trying such questions. However, the decision in Goode v. Elliott is supported, Hussey v. Crickett, 3 Camp. 168, and Jones v. Randall, Cowp. 37; and indeed the point is so well recognised, that all issues sent from the Court of Chancery to be tried at law, are, in the absence of special directions to the contrary, framed as upon wagers; and in Evans v. Jones, 5 Mee. & Welsb. 82, one of the learned Barons says: "It is too late now to say that no wager can be [*167] enforced at law, *though I think it would have been better if they had been originally left to the decision of the Jockey Club." In that particular case the wager was held invalid on the ground that, under the particular circumstamces, its tendency was to obstruct the course of public justice, which is an objection sufficient, as I have already explained in the commencement of the lecture, to invalidate a contract at common law.[1]

found discussed in Applegarth v. Colley (supra); Thorpe v. Coleman, 14 Law Jour. C. P. 260; Bentinck v. Connop, 5 Q. B. 693, 48 E. C. L. R.; Fisher v. Waltham, 4 Q. B. 889, 45 E. C. L. R.; M'Kinnell v. Robinson (supra); see also 5 & 6 W. 4, c. 41.

[1] By the common law, wagers were valid; Good v. Elliott, and cases cited supra; Campbell v. Richardson, 10 Johnson, 206; Haskett v. Wooton, 1 Nott & M'Cord. 180; Clark v. Gibson, 12 New Hamp. 386; Ball v. Gilbert, 12 Metcalf, 397; Scott v. Duffy, 2 Harris (Pa.),

There is, however, one class of *wagers* besides those on *gaming* which are invalid by the statute law. I

18; except so far as contrary, 1. To public policy, or 2. To private character or feelings. The former ground renders invalid all wagers on the result of an election; Allen v. Hearn, 1 Term, 56; Ball v. Gilbert, supra; Rust v. Gott, 9 Cowen, 169; Wheeler v. Spencer, 13 Connecticut, 28; Lloyd v. Leisening, 7 Watts, 294; Wagonseller v. Snyder, Id. 343; Wroth v. Johnson, 4 Har. & M'Hen. 284; Gardner v. Nolen, 3 Harrington, 420; Laval v. Myers, 1 Bailey, 486; Duncan v. Cox, 6 Blackford, 270; on the acquittal or discharge of a prisoner; Evans v. Jones, 5 Mees. & Wels. 77; on the result of a prize fight; Hunt v. Bell, 1 Bing. 1, 8 E. C. L. R.; M'Keon v. Caherty, 1 Hall, 300; in restraint of marriage; Hartley v. Price, 10 East, 22, and the like. The second ground renders invalid, wagers as to whether an unmarried woman would have a child by a certain day; Ditchurn v. Goldsmith, 4 Camp. 132; as to the sex of a third person, De Costa v. Jones, Cowper, 729 (which was the well-known case as to the sex of the Chevalier D'Eon); as to the life of a human being, Philips v. Jones, 1 Rawle, 37; and perhaps as to the solvency of a third person; Thornton v. Thackray, 2 Younge & Jerv. 156.

But as actions on wagers of any kind were never favored by the courts, they have at times gone so far as to hold all wagers to be invalid; Lewis v. Littlefield, 15 Maine, 233; Collamer v. Day, 2 Vermont, 144; Edgill v. M'Laughlin, 6 Wharton, 179; Thomas v. Cronise, 16 Ohio, 54: Hart v. Hart, 6 N. Hamp. 104; Rue v. Gist, 1 Strobhart, 82; and in many of the States statutory provisions exist, forbidding wagering or gaming contracts, to a greater or less extent; Wheeler v. Spencer, 15 Connect. 28; Fowler v. Van Surdam, 1 Denio, 537; Fairis v. Kirtley, 5 Dana, 460.

Where a wager is invalid from any of the above causes, so long as the money remains in the hands of the stakeholder, it is considered as being still within the control of the parties, and the loser may maintain an action to recover his stake; M'Allister v. Hoffman, 16 Serg. & Rawle, 148; M'Allister v. Gallagher, 3 Penn. 464; Tarleton v. Baker, 18 Vermont, 9; although if the money have been actually and bona fide paid over by the stakeholder to the winner, no part of it can be recovered from the latter by the loser, for the case then comes within the maxim, *in pari delicto potior est conditio defendentis;* M'Allister v. Hoffman, supra; Speise v. M'Coy, 6 Watts & Serg. 485; Danforth v. Evans, 16 Vermont, 538; Machin v. Moore, 2

allude to wagers in the shape of policies of insurance. An insurance, as you doubtless are aware, is a contract by which, in consideration of a premium, one or more person or persons assure another person or persons in a certain amount against the happening of a particular event; for instance, the death of an individual, the loss of a ship, or the destruction of property by fire. These three classes of policies, upon *ships*, *lives*, and *fire*, are the most common of occurrence; but there is nothing to prevent insurance against other events; for instance, in Carter v. Boehm. 3 Burr. 1905, one of the most celebrated cases in the Reports,[1] Lord Mansfield and the rest of the then Court of Queen's Bench, supported a policy of insurance against foreign capture effected on a fortress. Now, this contract of insurance,

Grattan, 257; M'Hatton v. Bates, 4 Blackford, 63; Thomas v. Crorise, 16 Ohio, 54; but if the stakeholder should pay over the money to the winner, after notice from the loser not to do so, he would pay at his own risk, and being in the position of a mere agent whose authority has been revoked, he would be liable to the loser for the amount of his stake; Wheeler v. Spencer, supra; Ivey v. Phifer, 11 Alab. 335; Stacey v. Foss, 1 App. 335; Perkins v. Hyde, 6 Yerger, 238. The law was so held in New York in Vischer v. Yates, 11 Johnson, 23, but that decision was overruled by Yates v. Foot, 12 Id. 1; and although the Revised Statutes give a remedy against a stakeholder who pays over to the winner after notice from the loser, yet the courts apply the rule of Yates v. Foot, in cases not brought exactly within the statute as to form, time, &c.; Brush v. Keeler, 5 Wend. 250; Fowler v. Van Surdam, 1 Denio, 557.

The student will find most of these, as well as many other authorities upon the subject of wagers and of wagering policies, in the note to Godsall v. Boldero, 2 Smith's Lead. Cas. 250.

[1] Celebrated, because of the exposition by Lord Mansfield, of what concealment on the part of an insurer will vitiate a policy. See the notes to this case in 1 Smith's Leading Cases, 270, where, however, the English note is upon an incidental point in the case, whether the opinion of an insurance broker, as to the materiality of the facts conceded, was admissible in evidence.

though one of the most *beneficial known to [*168]
the law, since it enables parties to provide against events which no human skill can control, to provide, for instance, against the ruin of a family by the sudden death of a parent, the ruin of a merchant by the loss of his venture at sea, or of a manufacturer by the outbreak of a fire on his premises, though productive, therefore, of the most beneficial consequences to society, yet is very liable to be abused, and made an engine of mere gambling; for instance, A. insures B.'s life, i. e. he pays so much a year, or so much in the lump, to some one who is to pay him so much upon B.'s death. If B. owes him money, and his object is to secure himself, it is a *bonâ fide* insurance; but, if B. is a mere stranger, in whose life he has no interest, it is a mere wager. In order to prevent the contract of insurance from being thus abused, statute 14 G. 3, c. 48, prohibits wager policies, as they are called, altogether: prevents a man from insuring an event in which he has no interest. And where he has an interest, but not to the extent insured, prohibits him from recovering more than the amount of his interest.[1] The effect of this act, in a word, is to invalidate wagers framed in the shape of policies of insu-

[1] But if from another quarter he receives the amount of his debt, he cannot afterwards claim the amount of his insurance. This was the decision in the well-known case of Godsall v. Boldero, 9 East, 72; where the plaintiff, who was a creditor of Mr. Pitt, having insured his life for £500, the amount of the debt was, after his death, paid by his executors, and it was held in an action on the policy that the contract of insurance was one of indemnity, and that the loss which was at first supposed likely to result to the creditors from the death of Mr. Pitt, having been wholly obviated and prevented by the payment of the debt, the foundation of the action failed. S. P. Irving v. Richardson, 2 Barn. & Ad. 193, 22 E. C. L. R.; Brinley v. The National Insurance Co., 11 Metcalf, 195.

rance, thus in Paterson v. Powell, 9 Bing. 320, 23 E. C. L. R., a wager on the price of Brazilian shares framed like a policy was held invalid.

[*169] *This act applies to all subjects of insurance except marine risks, and they are provided for by the insertion of a similar prohibition contained in 19 G. 3, c. 37.(a)

[*170] *LECTURE VII.

STOCKJOBBING ACT—THE LORD'S DAY ACT — SIMONY—BILLS OF EXCHANGE FOR ILLEGAL CONSIDERATION—RECOVERY OF MONEY PAID ON ILLEGAL CONTRACTS.

THERE are some other heads of statutable illegality which are frequently set up as affording an answer to any attempt to enforce contracts vitiated by them. I directed your attention, on the last occasion, to the defences which arise under the usury laws, and the laws enacted for prevention of gambling; noticing the exception in favour of horse-races, and the invalidity of certain wagers not falling within the statutes against gaming, by reason of the Acts of Parliament which prohibit wagering insurances. The first class of cases to which I will advert this evening, consists of those contracts which fall within the prohibition of what are called the stockjobbing acts.

The Act against stock-jobbing, is the 7th of Geo. 2, c. 8, which was a temporary Act, but was continued and made perpetual by the 10th of the same reign, c. 8. And it enacts, in substance—for the section is

(a) Though Insurance Offices have a full right to avail themselves of the above-stated deficiency of the required interest, they rarely do so unless there is reason to apprehend fraud. See Dowdeswell on Insurances, p. 62, where the law on the subject is clearly explained.

a long and verbose one—but, in substance, it enacts, that all contracts in the nature of wagers, relating to the *then present or future price of stock, or other public securities, shall be void; and that [*171] all premiums paid on any such contracts shall be recoverable back again by an action of debt, for money had and received.

It has been decided on the construction of this Act of Parliament, that it was not intended to apply to any except British securities, and, consequently, that it does not prohibit gambling in the foreign funds. The question was long contested, but has been finally decided by Wells v. Porter, 2 Bing. N. C. 722, 29 E. C. L. R.; Oakley v. Rigby, 3 Scott, 194, 36 E. C. L. R. 2 Bing. N. C. 732; Robson v. Fallows, 3 Bing. N. C. 392, 32 E. C. L. R.(*a*)

Another class of contracts are those falling within the operation of the statute commonly known by the name of the Lord's Day Act. It is 29 Car. 2, c. 7, and it enacts that no tradesman, artificer, workman, labourer, or other person whatever, shall exercise any worldly labour or business, or work of their ordinary callings, upon the Lord's day (works of necessity or charity only excepted), and that every person of the age of fourteen years offending in the premises shall forfeit five shillings.[1] The con-

(*a*) All wagers are void of this and every other description by 8 & 9 Vict. c. 100, s. 18. See ante, p. 165, n.

[1] At common law, judicial proceedings alone seem to have been forbidden on Sunday; Macalley's case, 9 Coke, 66 b; Comyn v. Boyer, Cro. Eliz. 485; Strong v. Elliott, 8 Cowen, 28; Sayles v. Smith, 12 Wendell, 59; Boynton v. Page, 13 Id. 429; Kepner v. Keefer, 6 Watts, 233; all other transactions therefore done on that day depend as to their illegality upon statutory prohibition. The history of the regulations gradually adopted on this subject was thus sketched by Gilchrist, J., in the recent case of Allen v. Denning, 14 New Hampshire, 136. "It appears," said he, "that the ancient

tracts prohibited by this statute are, you will observe, not every contract made on Sunday, but contracts

Christians used all days alike for the hearing of causes, not sparing (as it seemeth) the Sunday itself. One reason for this was, that they might not imitate the heathens, who were superstitious about the observance of days; and also, that by keeping their own courts always open, they might prevent Christian suitors from resorting to heathen courts. Spelman's Original of the Terms, c. 17; Swan v. Broome, 3 Burrow, 1598. But the practice ceased with the reason for it, and in the year 516, a canon was made, "*Quod nullus episcopus vel infra positus die dominico causas judicare præsumat.*" This canon, with others of a similar character, was confirmed by William the Conqueror and Henry the Second, and so became part of the common law of England. But the canons extended no farther than to prohibit judicial business on Sundays; for fairs, markets, sports, and pastimes might still take place on the Sabbath. Comyns v. Boyer, Cro. Eliz. 485, decides that a fair held on Sunday is well enough, although by the 27 Hen. 6, ch. 5, a penalty was inflicted on him who sold on that day. The toleration of amusements, and the existence of fairs in England to a greater or less degree upon the Sabbath, are readily accounted for by their known accordance with the practice of Roman Catholic countries, among which was England until the Reformation in the reign of Henry the Eighth. With the spread of the reformed religion, and the consequent improvement in civilization, the views and manners of the people changed on the subject of the rational observance of the Sabbath, and in all Protestant communities laws were enacted to secure it, varying in their provisions with the peculiarities of the people. Pastimes of various kinds were prohibited by the 1 Car. 1, c. 1, and by the 29 Car. 2, ch. 7. All persons were prohibited from "doing or exercising any worldly labour, business, or work of their ordinary calling upon the Lord's day." In the opinion of Lord Mansfield in Swan v. Broome, 3 Burrow, 1598, referred to in the above extract, the student will find much of the old learning on this subject.

It is believed that provisions, more or less similar to those of the statute of Charles, exist in all the United States. In New York, the statute refers only to "servile labour," and "exposing goods for sale." In South Carolina, New Hampshire, and Rhode Island, it has been nearly exactly copied. In many of the other States, such as Pennsylvania, Massachusetts, Maine, Vermont, and Connecticut, the

made in the exercise of a man's *trade or ordinary calling;* thus it has been decided in *R. v. Whitnash, 7 B. & C. 59, 14 E. C. L. R., that a [*172]

provisions are more strict, interdicting all secular labour, whether in one's ordinary calling or not. Thus, no action can be maintained for a deceit in the exchange of horses on Sunday, Robeson v. French, 12 Metcalf, 24, or a breach of warranty, Lyon v. Strong, 6 Vermont, 214; Adams v. Harnell, 2 Douglass, 73; nor for an injury received while travelling on that day, by reason of a defective highway (the journey not being one of necessity or mercy), Bosworth v. Swansey, 10 Metcalf, 365 (though it would be a work of necessity to repair the road on Sunday, Flagg v. Wilby, 4 Cush. 244); or on a note given on that day, Kepner v. Keefer, 7 Watts, 232, and the like. There was a rather early decision in Massachusetts (Greer v. Putnam, 10 Mass. 312), to the effect that a plea that a note was void because executed on Sunday, was bad on demurrer, but the case proceeded on the ground that the plea did not state on what part of Sunday the note was made, the act only extending between midnight on Saturday and the sunset of the next day, and though the authority of the case was more broadly applied in Clapp v. Smith, 16 Pick. 247, yet the recent cases have explained the decision on the ground just stated; Bosworth v. Swansey, 10 Metcalf, 364, *arg.*; Robeson v. French, 12 Id. 24.

In Specht v. The Commonwealth, 8 Barr, 313, it was held, affirming the previous decision of Commonwealth v. Wolf, 3 Ser. & Rawle, that the Pennsylvania Lord's Day Act was not at variance with the provision in the State constitution, declaring the right of freedom of conscience in religious matters, and a conviction, under the act, of one of the sect called Seventh Day Baptists was therefore sustained, the decision being based upon the ground of a day of rest being necessary to the welfare of society, and that the mere prohibition of secular occupation did not interfere with the right of conscience. The case of Cincinnati v. Rice, 13 Ohio, 225, was decided upon a clause in the local statute, exempting persons who conscientiously kept holy the seventh day, and a somewhat similar provision is found in the Massachusetts statute.

But although a bond may be void because executed on Sunday, so that, as a bond or contract, no suit can be maintained upon it, yet in a suit founded on the previous liability of the defendant, the bond may be regarded as an acknowledgment of that liability, as there is nothing to prevent a man from acknowledging the truth on Sunday,

contract made on Sunday by a farmer for the hire of a labourer is valid. The Court decided, in the first place, that a farmer was not a person within the meaning of the statute at all, for that the meaning of the words "tradesmen, artificer, workman, labourer, *or other person whatsoever*, was to prohibit the classes of persons named and other persons *ejusdem generis*, of a like denomination; and they did not consider a farmer to be so.[1] And, secondly, they held that even if the farmer were comprehended within the class of persons prohibited, the hiring of the servant could not be considered as *work done* in his *ordinary calling*, for, said Mr. J. Bayley, "those things which are repeated *daily* or *weekly* in the course of trade or business, are part of the ordinary calling of a man exercising such trade or business; but the hiring of a servant for a year does not come within the meaning of those words."

The former of the two points decided in this case furnishes a very good exemplification of the celebrated rule of construction as applied to statutes, namely, that where an act mentions particular classes of persons, and then uses *general* words, such as "*all others*," the general words are restrained to persons of the like description with those specified: the same construction was put upon the Lord's Day Act in a subsequent case, that of Peate v. Dicken, 1 C. M. & R. 422, 5 Tyrw. 116, [*173] where it was decided **first*, that an attorney was not within the description of persons in-

and consequently nothing to prevent its being given in evidence against him; Lea v. Hopkins, 7 Barr, 492, and in any case in which such a defence is set up, it is necessary that the statute be specially pleaded, Fox v. Mench, 3 Watts & Serg. 496, unless, of course, where local statutory or other rules of pleading have varied this general principle.

[1] So the act does not apply to the enlistment of a soldier on Sunday; Wotton v. Gavin, 2 Eng. Law & Eq. R. 154.

tended by the statute; and secondly, that, if he were, an agreement made on Sunday to become personally responsible for the debt of a client, could not be said to fall within his *ordinary calling*.

The cases in which the act is most frequently sought to be applied are those of sales, of which you may see instances in Fennell v. Rider, 5 B. & C. 406, 11 E. C. L. R.; Simpson v. Nicholls, 3 M. & W. 240. Yet, from the application of the act to those cases even, there are some exceptions; some created by the act itself, which permits food to be sold in inns and cook-shops to persons who cannot be otherwise provided, and for the sale of milk at certain hours; others, by 10 & 11 W. 3, c. 24, which legalizes the sale of mackerel before and after divine service; others by 5 & 6 W. 4, c. 37, which allows *bakers* to carry on their business to a certain extent and under certain restrictions, and, indeed, even before the passing of that act, or of the 34 G. 3, c. 61, on the same subject, it has been decided that a baker baking provisions for his customers was out of the purview of the act altogether as being a work of necessity (see R. v. Cox, 3 Burr. 787; R. v. Younger, 5 T. R. 449): and there are other exceptions created by other particular enactments, as, for instance, in case of hackney carriages.[1]

[1] A contract, however, for the sale of goods made on Sunday, is not affected by the statute, unless it is a complete contract on that day; Butler v. Lee, 11 Alab. 885; Adams v. Gray, 19 Vermont, 358, where the subject is elaborately examined. Thus, if the article was not to be delivered, or the price paid till another day, the contract would not be, under the Statute of Frauds, binding till that was done; Bloxsome v. Williams, 3 Barn. & Cress. 232; Beaumont v. Brengeri, 5 Com. Bench, 301. So of a promissory note written on that day, but not delivered till another; Lovejoy v. Whipple, 18 Vermont, 379; Clough v. Davis, 9 N. Hamp. 500. And although the consummation of the transaction may occur on

Another class of contracts falls within the prohibi-
[*174] tion of the acts aimed against *simony*. *There are two statutes on this subject: the 31 Eliz. c. 6, and 13 Anne c. 12; the former of which enacts that if any *patron*, for any corrupt consideration by gift or promise, directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity,—such presentation shall be void, the presentee shall be incapable of enjoying the benefice, and the Crown shall present to it.

The other statute is that of 12 Anne s. 2, c. 12, which enacts that if any person, for money or profit, shall procure in his own name, or in the name of any other, the next presentation to any living ecclesiastical, and it shall be presented thereupon, the contract is declared to be simoniacal, and the presentation is to devolve upon the Crown.

It was decided on the construction of the former Act, that of Elizabeth, very soon after it passed—that a contract to purchase a living actually vacant at the time of the purchase was a simoniacal contract, and avoided by the operation of the statute. That was taken for granted in Baker v. Rogers, Cro. Eliz. 788, which was decided but a very short time after the passing of the Act; but still, although, after the statute of Elizabeth, it was admitted that to contract for the right to present to a church *actually void* was simony, yet, it was also held, that it was not simony to purchase the next

Sunday, yet if the party seeking to enforce the rights growing therefrom, had ceased all *his* agency in the matter before that day, there will be no invalidation as to him; as where a case was submitted to arbitrators late on Saturday night, who made up their award early on Sunday morning, it was held that assumpsit might be maintained on the award, for the plaintiff had no voluntary agency in consummating the transaction on that day; Sargeant v. Butts, 21 Vermont, 101; Richardson v. Kimball, 28 Maine, 475.

presentation at a time when the church was full, *and it was therefore uncertain when that pre- [*175] sentation would accrue (see Cro. Eliz. 686, Smith v. Shelborne). And so the law continues to be to this day, with a qualification introduced by the statute of Anne, the nature of which I am about to explain to you.

The statute of Elizabeth, and the decisions upon it, had, as I have just said, established two points: first, that the right to present to an actually void benefice could not be purchased; secondly, that the right of next presentation might be so, provided that the living was full at the time of the contract. Certain clergymen took advantage of this state of the law to purchase next presentations, with the intention of presenting themselves, upon the occurrence of a vacancy. This practice, being considered highly indecorous, the statute of *the 12th of Anne* was passed to put a stop to it, and that Act renders it illegal and simoniacal on the part of a *clergyman* to purchase the next presentation to a living actually full, and to present himself, leaving the right of a layman to do so just as it stood before under the Act of Elizabeth.

The operation of these two statutes was elaborately discussed, first in the Queen's Bench, and subsequently in the House of Lords, in the great case of Fox v. Bishop of Chester, 2 B. & C. 635, 9 E. C. L. R., and 6 Bing. 1, 19 E. C. L. R. In that case the incumbent of a living was exceedingly ill, and upon his death-bed. The proprietor of the advowson and *another [*176] person being aware of this, and believing that his death was at hand, agreed for the sale of the next presentation, and in order to carry the agreement into effect, executed a deed a few hours only before his death, which purported to convey the advowson to the

vendee for ninety-nine years, but contained a proviso for re-conveyance as soon as one presentation should have been made. After the death of the incumbent, the vendee under this deed presented a clergyman who was in no way privy to the bargain, and, consequently, the only question was as to the legality of the bargain itself, and it was strongly urged that it was void; for, it was contended, that the transaction was a fraud upon the statute of Elizabeth, since, under the circumstances, the living was for every *practical* purpose vacant at the time of the contract, although it was possible that the incumbent might linger on for a few hours after the delivery of the deed. And such was the opinion of the Court of Queen's Bench, who delivered their judgment accordingly. But it was carried to the House of Lords, and there reversed according to the unanimous opinion of the other judges, and of Lord Eldon, who was at that time Chancellor. Connected with, and, indeed, forming a part of this branch of the subject, are the decisions with regard to *resignation bonds*, the history of which is extremely curious.(*a*)

(*a*) The following summary of the Law of Simony as it now stands, is given in Mr. Cripp's able "Treatise on the Laws relating to the Church and Clergy," p. 495.

"It is not simony for a layman, or spiritual person not purchasing for himself, to purchase while the church is full, either an advowson or next presentation, however immediate may be the prospect of a vacancy; unless that vacancy is to be occasioned by some agreement or arrangement between the parties.

"Nor is it simony for a spiritual person to purchase for himself an *advowson*, although under similar circumstances. If either a layman or spiritual person purchase an advowson while the church is vacant, a presentation by the purchaser upon any future avoidance, after the church has been filled for that time, is not simony.

"It is simony for any person to purchase the next presentation while the church is vacant.

*It had become a very common practice when [*177]
the patron of a living had a son intended for the
church, and the living happened to become vacant during the young man's minority, for the patron to present a clergyman, who entered into an agreement to resign as soon as the patron's son should be of age to hold the preferment. These contracts were usually made by way of bond, conditioned to resign on the contingency happening, and which, from the nature of the
*transaction acquired the name of *Resignation* [*178]
Bonds. At first a doubt was entertained whether
these bonds did not offend against the provisions of the Act of Elizabeth, since the clergyman who executed such an instrument could hardly be said to have been presented gratuitously, inasmuch as he agreed to bind himself in the penal sum as a condition precedent to his obtaining the preferment, and inasmuch as in case of his refusing to resign, and allowing the penal sum to be forfeited, he actually would have given up that sum of money for the sake of holding the living. However, in Johns v. Lawrence, Cro. Jac. 248, first the Queen's Bench, and then the Exchequer Chamber, decided that such an instrument was good: and the reason assigned for this was, that a father is bound by nature to provide for his son, and therefore that, though the clergyman was presented under an agreement, yet it was not an agreement upon any corrupt consideration, but more

"It is simony for a spiritual person to purchase for himself the next presentation, although the church be full.

"It is simony for any person to purchase a next presentation, or if the purchase be of an advowson, the next presentation by a purchaser would be simoniacal, if there is any agreement or arrangement between the parties at the time of the purchase, for causing a vacancy to be made.

"If any person purchase an advowson while the church is vacant, a presentation by the purchaser for that vacancy is simony."

resembled the case of a bond to resign in case of non-residence or of taking any other living, which had both been decided to be for the good of the public, and free from any objection on the score of simony. But still another question remained, for in course of time it became usual to exact from the clergyman a bond conditioned to resign—not on the patron's son, or any other particular person becoming qualified to hold the living [*179] —but to resign *generally* at the request of *the patron whenever he should think proper to signify it. These bonds, which were called *General Resignation* Bonds, stood, it is obvious, on a different footing from the former ones, for they reduced the clergyman to a state of complete dependence on the will and pleasure of the patron. However, in Ffytche v. The Bishop of London, which is reported in Cunningham on Simony, 52, and was finally decided in the year 1783, first the Court of Common Pleas, and then that of the King's Bench, decided that such bonds were valid. But, on a writ of error to the House of Lords, that decision was reversed by a majority of lay peers voting against the expressed opinion of a majority of the judges. After that period there was for a long time a strong inclination on the part of the Courts to confine the authority of that decision of the peers to cases precisely similar to itself, as you will see from the judgments in Bagshaw v. Bosley, 4 T. R. 78; Partridge v. Whiston, 4 T. R. 359; Newman v. Newman, 4 M. & S. 71. However, at last, in the year 1826, the matter came again before the House of Lords in the case of Fletcher v. Lord Sondes, 3 Bing. 501, 11 E. C. L. R., under the following circumstances.

An action was brought in the Queen's Bench by Lord Sondes against the Reverend William Fletcher upon a bond of 12,000*l*. The condition was not to

commit dilapidations, and to resign within a month after request, the rectory of Kettering *in the county of Northampton, to which Lord Sondes [*180] then presented him, in order that his lordship might be enabled to present one of two younger brothers, whose names the condition specified. Upon this bond, judgment was allowed to go by default; and a writ of error being brought in the House of Lords, the judges were called on to deliver their opinions, which they all did with the exception of Mr. J. Bayley, Mr. J. Holroyd, and Mr. J. Littledale. There was a difference of opinion amongst them, and they delivered their opinions therefore *seriatim;* the judges who thought the bond valid being L. C. J. Best, Mr. J. Burrough, and Mr. J. Gaselee; those who thought it invalid being the L. C. J. Abbott, C. B. Alexander, Mr. J. J. A. Parke, Baron Garrow, B. Graham, and B. Hullock. The Chancellor agreed with the majority, and the judgment of the court below in favour of the plaintiff was reversed. Now the bond in this case was not a general resignation bond. It was a special one in favour of the obligees, two brothers. And the effect of this decision was, not only to establish the decision in the Bishop of London v. Ffytche, but to overturn the decisions which had previously taken place in favour of special resignation bonds, and render all bonds conditioned for the resignation of a clergyman illegal. But as the consequences of this would have been exceedingly hard upon persons, who had executed special *resignation bonds at the time when they were looked upon as legal, the Archbishop of Canter- [*181] bury immediately brought in a bill, which he laid on the table of the House as soon as the Lords had assented to the Chancellor's motion to reverse the judgment of the Queen's Bench in Fletcher v. Lord Sondes,

and which afterwards passed into law. It is the 7 & 8 Geo. 4, c. 25, which confirms such bonds and contracts if made before the 9th of April, 1827, the day of the decision in Fletcher v. Lord Sondes, for resignation in favour of one, or one of two specified persons. And thus the law continued; all general bonds of resignation being void, and special ones in favour of one person, or one of two persons, good if before April 9th, 1827, and void if subsequent to that day, until the passing of the 9 Geo. 4, c. 94, which rendered special resignation bonds and contracts entered into after the passing of that Act good, if in favour of one, or one of two persons standing in the relation of uncle, son, grandson, brother, nephew, or grand-nephew to the patron, by blood or marriage.

Thus stands this curious branch of law. Resignation contracts prior to April 9th, 1827, being governed by 7 & 8 Geo. 4, c. 25, conjointly with the statutes of Elizabeth and Anne; between that day and the passing of 9 Geo. 4, c. 94, by the statutes of Anne and Elizabeth, as explained in Fletcher v. Lord Sondes; and, subsequently, *by the 9 Geo. 4, c. 94, in conjunction with the statutes of Anne and Elizabeth.(a)

[*182]

Another class of illegal contracts, of not unusual occurrence, consists of those which are invalid, on the ground that they amount to illegal attempts to charge

(a) By this final enactment (9 Geo. 4, c. 94), which regulates the ground of any bond of resignation, the settled law is, "that no other or collateral condition can be annexed to a resignation, which must take place *pure, sponte, et simpliciter*, in order to exclude all indirect bargains not only for money, but for any other valuable consideration." See Cripps, p. 569.

It should be however noted, that the case of an exchange of benefices creates this exception, i. e. that a resignation for such purpose is legal, provided that it be made for this sole object, and that the exchange take full effect.

an ecclesiastical benefice. The obvious impolicy of allowing the provision made by law for the support of the church to be diverted to secular purposes, occasioned the enactment of the 13 Eliz. c. 20, which directs that all *chargings* of benefices other than rents reserved upon the leases which the law allows to be made should be void. This act was repealed by 43 Geo. 3, c. 84, but revived again by 57 Geo. 3, c. 99. The cases have mostly arisen on contracts made for the purpose of charging an annuity granted by a clergyman upon his benefice. These contracts are held void (see Alchin v. Hopkins, 1 Bing. N. C. 99, 27 E. C. L. R.; Flight v. Salter, 1 B. & Ad. 673, 20 E. C. L. R.), and where it appears on the face of a warrant of attorney given by a clergyman, that his intention in executing it was that the benefice *should be sequestered towards the liquidation of an annuity [*183] or other charge, the courts will set it aside (Saltmarshe v. Hewett, 1 Ad. & Ell. 812, 28 E. C. L. R.; Newland v. Watkins, 9 Bingh. 113, 23 E. C. L. R.), though they will not do so where no intention to create such a charge appears on the face of the warrant of attorney itself, though its effect may and probably will be to occasion an execution to issue, under which the profits of the benefice will be sequestered; Bendry v. Price, 7 Dowl. 753; Colebrook v. Layton, 4 B. & Ad. 578, 24 E. C. L. R.; Moore v. Ramsden, 7 A. & E. 898, 34 E. C. L. R.

I have now touched upon the classes of contracts invalidated by express enactment, which are of most frequent and practical occurrence,(*a*) and it remains to mention one point, also, arising from a late statute, which has done away with a distinction which was

(*a*) See "Contracts by Public Companies," post.

formerly found an exceedingly troublesome one, and frequently very unjust in its operation.

You are probably aware that the general rule of the law of England is that a *contract* is not *assignable*; that is, a man who has entered into a contract cannot transfer the benefit of that contract to another person, so as to put that other person into his own place, and entitle him to maintain an action upon it in case of its non-performance.[1] But, you are probably also aware, that there are some contracts which, by the [*184] *operation either of a statute, or of some peculiar rule of commercial law, are exempted from the operation of the above rule, and rendered transferable in the same way as any other property from man to man.

Such are bills of exchange, which, by the law merchant are transferable by *endorsement*, if payable to order, by *delivery* if payable to bearer. Such, too, are promissory notes, which, by the statute of 4 Anne, c. 9, are placed on the same footing with bills of exchange. Now, where some one of these instruments had been made upon an illegal consideration; where, for instance, a bill of exchange was accepted for an illegal gambling debt, it is obvious that no action could be maintained between the original parties to it; for instance, in the case I have just put, by the drawer of such a bill against the acceptor of it; for, as between them, it is the common case: they both knew of the illegality, and nevertheless, with their eyes open, made it the consideration of their contract. But,

[1] It is equally familiar, however, that such assignments are supported by courts of equity, and the student will find the law upon this subject, which it is not pertinent to dwell upon here, correctly stated in the notes to Row v. Dawson, 2 White's Eq. Cas. Part 2, 175.

where the instrument had gone out of the hands of the person to whom it was originally given, and had got into the hands of some third person, the case very much altered; for he might not, and, probably, did not know of any illegality; and, if he did not, it was hard that he should lose the benefit of that for which he had paid, in consequence of the illegal act of other persons, in which he did not participate, and of which he did not know. For instance, to take again the *same example:—A. loses 100*l.* to B. at whist, and accepts a bill for the amount. If B. [*185] afterwards sues A. on that note, and A. pleads the illegality, this, though not perhaps in conformity with the very nice principles of honour, cannot be said to be a hardship upon B., for he knew when he sat down to play, and he knew when he drew the bill, that he could not enforce such a demand. But, suppose, instead of suing on the acceptance himself, he has procured C. to discount it, and had endorsed it to him, and C. had paid full value for it, and knows nothing of the gaming debt for which it was given. In such a case it would be an exceedingly hard thing indeed to prevent C. from recovering the amount from the acceptor. Yet, notwithstanding this, there were till lately several cases in which he would have been precluded from doing so.[1]

The law stood thus:—Whenever illegality depended on the common law, or on an act of Parliament which did not in express terms render the security void,

[1] These cases were Bowyer v. Bampton, 2 Strange, 1155; Peacock v. Rhodes, Dougl. 636; Lowe v. Walker, Id. 736; Ackland v. Pearce, 2 Campb. 599. The words of the usury and gaming acts were thought too strong to be got over, and the law has been held the same way under similar statutes on this side of the Atlantic; Unger v. Boas, 1 Harris (Pa.), 602; Lucas v. Waul, 12 Smedes & Marsh. 157.

there the Courts applied the rule which reason and justice dictate, and held, that the person who had given value for the security, and had taken it without notice that it was affected by any illegality, was entitled to recover upon it. There were, however, some cases in which, by the positive enactments of particular statutes, the security was rendered void. Such, for instance, was an acceptance of the description I have [*186] just supposed, given for *a gaming debt. Such also, at one period, was a bill or note given upon a usurious consideration. But the hardship in the case of usury was found so great, that a particular act, 58 Geo. 3, c. 93, was passed in order to put an end to it. And, at length, stat. 5 & 6 Will. 4, c. 41, has altogether made an end of the distinction, and the grievances which it occasioned, by enacting that such instruments shall be no longer *void*, but shall be deemed and taken to have been given for an *illegal consideration;* the consequence of which is that they are still void as between the original parties, and also as against all persons who have taken them with notice of the illegality, or after they had become overdue, or without giving value for them; but good in the hands of every person who has given value, and taken the instrument before it was due and *bonâ fide*. The only case as yet decided in this statute is Hitchcock v. Way, 6 Ad. & Ell. 943, 33 E. C. L. R.(*a*)[1]

(*a*) See Robinson v. Reynold, 2 Q. B. 196, 42 E. C. L. R. Now, however, the 8 & 9 Vict. c. 109, s. 18, as we have seen, has rendered all contracts on games and wagers, not merely illegal as to the consideration, but absolutely void.

Where it is proved that a note has been obtained by fraud or

[1] The provisions of the statute of 58 Geo. III. c. 98, were adopted in the New York Revised Statutes, v. 1, 772, § 5, under which acts it has been obviously held, that as soon as the defendant shows there

*There is one other point which I will notice before altogether leaving the head of illegality. [*187]

tainted by illegality, that affords a presumption that the person who has been guilty of the illegality, will dispose of and place it in the hands of some other person to sue on it: such proof, therefore, casts on the plaintiff the burden of showing that he was an endorsee for value. (See Bailey v. Bidwell, 13 M. & W. 73.) But where an issue is joined on a plea of *non accepit*, and the proof offered of the acceptance is the signature of one partner competent to bind the firm, then, though the defendants show that this signature was a fraudulent act on the part of such partner, yet, if the proof does not affect the plaintiff with knowledge of the fraud, that does not put the plaintiff to an answer, nor make it necessary for him to give any explanation or account of the transaction; Musgrave v. Drake, 5 Q. B. 185; see also Braithwaite v. Gardiner, Bart., 15 Law Jour., Q. B. 187; Pitt v. Chappelow, 8 M. & W. 616; Canal Bank v. Bank of Albany, 1 Hill, 287.

A variety of cases have been decided on different transactions, upon the principles laid down above. See, amongst others, Daniels v. Coombe, 2 M. & Gr. 347, 40 E. C. L. R.; Jeffreys v. Evans, 14 Mees. & Wels. 210; Baker v. Walker, Id. 465; Brooks v. Mitchell, 9 M. & W. 15; Brown v. Philpot, 2 M. & Rob. 285, per Ld. Denman; Scott v. Taylor, 6 Jurist, 464, C. P.; Wood v. Connop, 5 Q. B. 292, 48 E. C. L. R.

As regards admissions on the record, see Robins v. Maidstone, 4 Q. B. 811, 45 E. C. L. R., and Smith v. Martin, 9 M. & W. 304.

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has been usury between the prior parties, he casts on the plaintiff the burden of proving that he is a holder for value; Wyatt v. Campbell, Moody & Malk. 80; Hackley v. Sprague, 10 Wendell, 113; Young v. Berkeley, 2 New Hamp. 410; Williams v. Little, 11 Id. 66; Henrick v. Andrews, 9 Porter, 10; as is the case in every instance where fraud, duress, or illegality is shown between the prior parties; Monroe v. Cooper, 5 Pick. 412; Vallet v. Parker, 6 Wend. 615; Beltzhoover v. Blackstock, 3 Watts, 26; and it seems at one time to have been thought that if the defendant could prove *want* or *failure* (not an *illegality*) of consideration between the prior parties, this would throw on the plaintiff the burden of proving himself a holder for value; Grant v. Vaughan, 3 Burrow, 1516; Patterson v. Hardacre, 4 Taunt. 144; De la Chaumette v. Bank of England, 2 Barn. & Cress. 208; Heath v. Sansom, 2 Barn. & Adolph. 291; but in Whitaker v.

I have hitherto spoken of illegality as avoiding a contract, and of course as operating by way of defence to any action brought upon the contract which it affects. But put the case that an illegal contract has been in part performed—that money, for instance, has been paid in pursuance of it—*no action will lie to recover that money back again.* At an early period of the law it was thought that such an action might be perhaps maintainable upon the ordinary principle, that an action will lie to recover back money which has been [*188] paid on a consideration *which has failed. Thus, for instance, in the common case of an insurance, supposing that I insure a ship during a

Edmunds, 1 Mood. & Rob. 366, Patterson, J. said, "Since the decision in Heath v. Sansom (2 B. & Ad. 291), the consideration of the judges has been a good deal called to the subject, and the prevalent opinion amongst them is, that the courts have of late gone too far in restricting the negotiability of bills and notes. If, indeed, the defendant can show that there has been something of a fraud in the previous steps of the transfer of the instrument, that throws on the plaintiff the necessity of showing under what circumstances he became possessed of it, so far I accede to the case of Heath v. Sansom: for there were in that case circumstances raising a suspicion of fraud; but, if I added on that occasion, that even independently of these circumstances of suspicion, the holder would have been bound to show the consideration which he gave for the bill, merely because there was an absence of consideration as between the previous parties to the bill, I am now decidedly of opinion that such doctrine was incorrect." The opinion thus expressed, has since been confirmed in many cases. See also Heydon v. Thompson, 1 Adolp. & Ell. 210; Low v. Chifney, 1 Bing. N. C. 267; Knight v. Pugh, 4 Watts & Serg. 448; where the reason for the change of decision, is thus clearly given. "In cases other than those of negotiable notes obtained or put in circulation by fraud or undue means, the maker, by its negotiable character, agrees that the payee shall put it in circulation. He has no right, therefore, to complain of his own act; and a holder placing confidence in such paper, ought not to be compelled to prove consideration."

voyage, and she never sails upon it, I should be entitled to recover back the money as paid upon a consideration which had failed; for the consideration for my paying the premium was the risk the underwriter was to take upon himself, but as the risk was to be contemporaneous with the voyage, and as that never commenced, so neither did the risk, and consequently, nothing was ever given in exchange for the money. So, in the ordinary case of an action for the deposit. If A. sells an estate to B., B. paying a part of the purchase-money as a deposit, if A. afterwards prove unable to make out a title, B. may recover back the money deposited for the consideration, for it was the sale which has become abortive.[1] Such are the common cases, such the common rule; where money has been paid upon a consideration which totally fails, an action will lie to recover it back again. But it is otherwise where the contract was an illegal one. Where money is paid in pursuance of an illegal contract, the consideration of course fails, for it is impossible for the party who has paid the money to enforce the performance of the illegal contract. Still no action will lie to recover it back again. The reason of this is, that the law will not assist a party to an illegal contract. He has lost his money, it is true, but he has lost it by his own *folly in entering into a [*189] transaction which the law forbids. You will see instances of this in M'Kinnell v. Robinson, 3 M. & W. 441; Howson v. Handcock, 8 T. R. 575; Browning v. Morris, Cowp. 590; and Lubbock v. Potts, 4 East, 449; which is the very case I put, that of an insurance, in which, if the risk be not run, the premium may be recovered back again; but in Lubbock v. Potts, the insurance was an illegal one, and it was therefore held

[1] *Sic. in orig.* The sentence is evidently incomplete.

that, though it could not have been enforced, the insured should not recover back the premium. The point is forcibly put by L. C. J. Wilmot, in his celebrated judgment in Collins v. Blantern, which I have several times cited from 2 Wilson, 341. "Whoever," says his lordship, "is a party to an unlawful contract, if he have once paid the money contracted to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again. You shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back. Procul, O procul este, profani!"[1]

To this rule, however, there are two exceptions. The first is *where the illegality is created by some statute, the object of which is to protect one class of men against another.* In cases of this sort, although the contract is illegal, and although a person belonging to the class *against* whom it is intended to protect others, cannot recover money he has paid in pursuance of it, [*190] *yet a person belonging to the class to be protected may, since the allowing him to do so renders the Act more efficacious. You will see this proposition illustrated by the case of Smith v. Bromley, 2 Dougl. 696, note, which turned on the application of one of the old bankrupt Acts; that Act, to prevent practices on bankrupts who had not obtained their certificates, and who for the sake of obtaining them were likely to be willing to submit to any terms, however hard, that might be imposed upon them, vacated all securities given by the bankrupt, or any one on his behalf, in consideration of the signature of the certificate. A

[1] The familiar maxim applies, "*In pari delicto, potior est conditio defendentis;*" and instances of its application may be found in Worcester v. Easton, 11 Mass. 368; Merion v. Huntington, 2 Connect. 209; Perkins v. Savage, 15 Wendell, 412, and in many other cases.

creditor refused to sign the certificate unless a sum of money was paid him by a friend of the bankrupt's, and the money having been paid, it was held that a person who had paid it might recover it back again: Jacques v. Withy, 1 H. Bl. 65; Jacques v. Golightly, 2 Bl. 1073; Williams v. Hedley, 8 East, 378; Taylor v. Lendey, 9 East, 49; Smith v. Cuff, 6 M. & S. 160.[1]

The other exception is, that when money has been paid in pursuance of an illegal contract, but paid not to the other contracting party, but to a stakeholder, then either party may recover it back again; for instance, if parties agreed to play at an illegal game, and each deposited his stake in A.'s hands, either might recover it back from A.; for it is obvious that in this case to *allow the money to be recovered is to allow the parties a *locus pœnitentiæ*, within which [*191] they may repent of their illegal contract, and refrain from completing it at all; see Botton v. Thurland, 5 T. R. 405; Smith v. Bickmore, 4 Taunt. 474; Hastelow v. Jackson, 8 B. & C. 221, 15 E. C. L. R.; Hodson v. Terrill, 1 C. & M. 802. (*a*)[2]

I have now done with the contract itself. I have stated the various points relating to the contract itself, the consideration and the effect of illegality on either. In the next lecture I shall speak of the parties to it. (*b*)

(*a*) But if the wager were not illegal, such as one on a foot-race for less than 10*l.* (before the late Wager Act was passed), neither of the bettors could recover back his stake from the stakeholder before the determination of the event; Emery v. Richards, 14 M. & W. 728.

(*b*) There are many contracts which, though legal in themselves, may be illegally authenticated, and which cannot consequently be enforced: such are all written agreements which the law requires to

[1] See supra, note to p. 125. [2] See the cases cited supra to p. 167.

be stamped, but to which no stamp, or a stamp of too low an amount has been fixed. The contract itself is not avoided, but it is incapable of being enforced, for as soon as it appears that the agreement was reduced to writing, no parol evidence of it is any longer admissible; and if the agreement be unstamped, and is produced in order that it may be set up as an agreement and to have effect given to it, it cannot be read and shall not be received in evidence at all—the jury cannot see it, the judge cannot use it. (Buxton v. Cornish, 12 M. & W. 426; Williams v. Gerry, 10 M. & W. 296.) But a copy of an original deed not produced when called for, which copy has been compared with and sworn to, is admissible. (Braythwayte v. Hitchcock, 10 M. & W. 494.) And where a deed more than thirty [*192] *years old, requiring an *ad valorem* stamp, bears the mark of having had one on it, it will be presumed to have been a proper one. (Doe d. Fryer v. Coombs, 3 Q. B. 687, 43 E. C. L. R.) In all other cases, wherever it appears that a written instrument existed, it must be produced; but if the plaintiff can get through his case without making this appear, he cannot be nonsuited by the *defendant* producing it, even if it proves to be unstamped. (Fielder v. Ray, 6 Bing. 332, 19 E. C. L. R.) Unstamped agreements which require to be stamped may be read in court to establish fraud or crime, and to show that it was an illegal agreement. (Coppock v. Bower, 4 M. & W. 361.) An unstamped bill of exchange is admissible upon the same principle, where it is produced to show its worthlessness. (Smart v. Nokes, 6 M. & Gr. 911, 46 E. C. L. R.)

A distinction as to the kind of stamp required exists between deeds and other contracts. The stamps assigned to deeds are set forth in the 55 Geo. 3, c. 184, which imposes *ad valorem* stamps upon all conveyances, grants, leases, surrender of leases, bonds, assignments, mortgages, bills of sale, declarations of trust, deeds of partition, and some other specialties; it then imposes a duty of 1*l.* 15*s.* (with an increase according to length) upon all deeds not specified or expressly exempted by the schedule of the act: and questions often arise whether certain deeds fall within the category of those requiring an *ad valorem* stamp, a stamp of 1*l.* 15*s.*, or of those exempted from the necessity of being stamped at all. Cases have recently occurred in which the distinction has arisen as regards mortgage deeds in Doe dem. Bowman v. Lewis, 13 M. & W. 241; Lant v. Pearce, 8 Ad. & Ell. 248, 35 E. C. L. R.; Wroughton v. Turtle, 11 M. & W. 561; Doe d. Jarman v. Larder, 3 B. N. C. 92, 32 E. C. L. R.; Doe d. Mercerm v. Bragg, 8 Ad. & Ell. 620; Sellick v. Trevor, 11 M. & W. 722; and Harris v. Birch, 9 M. & W. 591. As regards transfer

of mortgages, in Doe dem. Snell, and Short v. Tom, 4 Q. B. 615, 45 E. C. L. R., and Brown v. Pegg, 7 Q. B. 1, 53 E. C. L. R. As regards conveyances, in Phillips v. Morrison, 12 M. & W. 740; Wolseley v. Cox, 2 Q. B. 321, 42 E. C. L. R. As regards leases, in Wilson v. Smith, 12 M. & W. 401; *Nicholls v. Cross, 14 Law Jour. Exc. 244 [since reported 14 Mees. & Welsby, 42]; [*193] Eagleton v. Gulleridge, 11 M. & W. 465. As regards bonds, in Corn Exchange of Winchester v. Gillingham, 4 Q. B. 475, 45 E. C. L. R.; Dearden v. Binns, 1 M. & Ry. 130, 17 E. C. L. R.; Frith v. Rotherham, 15 Law Journ. Exc. 133 [since reported 15 Mees. & Wels. 59]. Declarations of Trust, in Haywood v. Bibby, 11 M. & W. 812. As regards bills of sale, in Pierrepont v. Gower, 4 M. &. Gr. 795, 43 E. C. L. R. And deeds of apprenticeship, in Rex v. Chipping Norton, 5 B. & Ald. 412, 7 E. C. L. R.

The 55 Geo. 3, c. 184, also requires that agreements (not being deeds) shall be stamped whenever "the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument; together with every schedule, receipt, or other matter, put or endorsed thereon, or annexed thereto." The amount of the stamp was under that statute proportioned to the length of the agreement; 1*l.* being the minimum. (The 7 & 8 Vict. c. 21, has reduced this stamp to one of 2*s.* 6*d.*, for all agreements requiring a stamp under the 55 Geo. 3, c. 184.) The value applies to the subject-matter of the agreement, and not to any matter to which the agreement may collaterally relate. (Latham v. Rutley, 1 Ry. & M. 13.)

The agreement must purport to be, and actually be, one, and not a mere proposal, offer, or memorandum containing the terms of an agreement, but not signed by both parties, Bethel v. Blencowe, 3 M. & Gr. 119, 42 E. C. L. R.; Blackwell v. MacNaughton, 1 Q. B. 127, 41 E. C. L. R.; Mullett v. Hutchinson, 7 B. & Cr. 639, 14 E. C. L. R.; Hawkins v. Warre, 3 B. & Cr. 690, 10 E. C. L. R.; Wallis v. Broadbent, 4 Ad. & Ell. 877, 31 E. C. L. R. See also Vaughton v. Brine, 1 M. & Gr. 359, 39 E. C. L. R.; in which case Tindal, C. J. lays it down that "where a memorandum may have been either a proposal, or an authority to enter into a contract, or a resolution that was afterwards carried into effect, and therefore only evidence of the terms of an agreement subsequently made," there no stamp is required. And Maule, J., explained the last part of the clause above cited, as follows: "The subsequent words, 'whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument,' are, I conceive, *used to exclude the excuse that the agreement, of which some memorandum is [*194]

given as evidence, need not have been made in writing; which would, in every case not within the Statute of Frauds, enable a party to give in evidence a written contract without its being stamped." A prospectus or any document of which a parol agreement adopts the terms, must be stamped, according to the doctrine of Lord Ellenborough, C. J., in Edgar v. Blick, 1 Stark. R. 464, 2 E. C. L. R.

Every separate contract, and every contract endorsed with fresh terms, must be separately stamped, though they relate to the same subject-matter (Reed v. Deare, 7 B. & Cr. 261, 14 E. C. L. R.); but where several parties join in one agreement one stamp suffices. (Davis v. Williams, 13 East, 232.)

The statute, it will be observed, imposes the stamp-duty only on such agreements as relate to matters of the value of 20*l.* and upwards: this applies to the immediate subject-matter of the contract, as, for instance, an agreement to carry goods will be governed not by the value of the goods, but by the charge for carrying. (Latham v. Rutley; and see Hill v. Ramm, 5 M. & Gr. 789, 44 E. C. L. R.) So, agreements to warehouse goods for rent, depend not on the value of the goods deposited, but the matter of the agreement, which is the rent. (Baldwin v. Alsager, 13 M. & W. 365.) Nor is it enough to bring a case within the statute that the agreement may possibly be of the value of 20*l.*; it must be so in its nature and inception. Thus no stamp is required on an I O U which promises to pay interest at 5 per cent. on 45*l.* (Melanotte v. Teasdale, 13 M. & W. 216.) Nor is any stamp requisite where the value of the subject-matter is uncertain, as in the case of a guarantee to indemnify another against the unknown results of some act. (Cox v. Bailey, 6 M. & Gr. 193, 46 E. C. L. R.)

The schedule to 7 & 8 Vict. c. 21, imposes a duty of 2*s.* 6*d.* "for and in respect of every agreement or minute or memorandum of an agreement now chargeable with the duty of 1*l.*, under the head or title of 'Agreement,' in the schedule to the act of 55 G. 3, c. 184, annexed."

If the stamp is of sufficient value, though a wrong one, it is valid. [*195] See 10th Section *of the 55 Geo. 3, c. 184. Wherever there has been a material alteration in an agreement after stamping, it must be restamped. Agreements may be stamped at any time before they are produced at the trial, and 7 & 8 Vict. c. 21, s. 5, provides that this may be done within fourteen days after the making thereof, without any penalty: but if after that period, then on payment of 10*l.* penalty above the amount of the stamp.

The act provides that where "divers letters shall be offered in evi-

dence to prove one agreement between the party who shall have written such letters, it shall be sufficient if any one of such letters shall be stamped." And the case of Grant v. Maddox, 15 Law Journ. Ex. 104 [since reported 15 Mees. & Wels. 737], decides that this proviso applies to letters written by the agents as well as by the parties themselves.

Letters to an attorney, which merely authorize a party to put his name to bills of exchange, are not liable to the agreement stamp, but fall under the provision in the act for powers of attorney, though they contain an agreement for liability, provided it be only such an agreement as the law would imply from the authority given. (See 7 & 8 Vict. c. 21, s. 6; also Reg. v. Kelk, 12 Ad. & Ell. 559, 40 E. C. L. R.; Walker v. Remmett, 15 Law Journ., C. P. 174) [since reported 2 Com. Bench, 850].

Where an agreement contract is accompanied with a deposit of title deeds for making a mortgage, wadset, or other security on any estate or property therein comprised, the schedule, Part I., requires an agreement stamp. See Pyle v. Partridge, 15 Law Journ., Exc. 129 [since reported 15 Mees. & Wels. 20], as to what is not an accompaniment of the agreement with a deposit of the title-deeds.

All agreements requiring a stamp must relate to money; but all relating to money (even above 20*l.*) do not require a stamp; for there are many exemptions.

In the first place, the 55 of Geo. 3, c. 184, itself exempts from stamp duty any *memorandum or agreement for granting a lease or tack at rack-rent of any messuage, land, or tenement, under the yearly rent of* 5*l.*

It has been decided that this clause applies to agreements where the amount of rent is under 5*l.*, whether *the subject of the agreement be above that *value* or not. And it has been held, moreover, in the same case, that all agreements for leases are equally exempt from duty of which the rental is under 20*l.*, according to the above cited clause of the schedule, wherever the "*matter* of the agreement" is not the land, but the amount of rent. (Doe d. Marlow v. Wiggins, 4 Q. B. per Patteson, J. 376, 45 E. C. L. R.) The question is, what do the parties deal for? If merely for what the tenant is to give for the right of a specified occupation, the agreement requires no stamp, unless that amount be 20*l.* or upwards: if it be an agreement for a *lease* of the *land* or *tenement itself*, then it is exempted from stamp-duty only where the yearly rent is *under* 5*l.* [*196]

The act exempts any agreement "made for or relating to the sale of any goods, wares, or merchandise," which is not under seal. If

such agreement is under seal it falls under the requirements of deeds, and must be stamped accordingly.

This is the most important exemption. It involves the distinction between things relating to the land and *fructus industriales*, which we have already treated of. (See p. 61, note *a*.) The former requiring a stamp, the latter being exempted within the exemption which in all cases applies only to what are goods and chattels: fixtures are not. (Chanter v. Dickinson, 5 M. & Gr. 253, 44 E. C. L. R.)

The agreements within this exemption must have for their primary effect either the sale of goods or something that relates to their sale (Chanter v. Dickinson, supra): if so, it is immaterial if there be minor or collateral stipulations. But where the primary object of the agreement is a pledge, and a sale the ulterior or contingent condition, a stamp is required. (Smith v. Cator, 2 B. & Ald. 778.) And where some other term in the agreement is a primary co-ordinate object, and does not relate to a sale, the agreement must be stamped, for it is something more than a mere contract for the sale of goods: thus a sale of goods *and a goodwill* is not exempt. (South v. Finch, 3 Bing. N. C. 506, 32 E. C. L. R.) But warranties contained in receipt fall within this exemption, for they relate to the sale. [*197] *(Skrine v. Elmore, 2 Camp. 406.) So do agreements to share in purchases. (Marson v. Short, 2 Bing. N. C. 118, 29 E. C. L. R.) Guarantees for the payment of goods are within the exemption. (Warrington v. Furbor, 8 East, 242; Martin v. Wright, 14 Law Journ. Q. B. 142) [since reported 6 Queen's Bench 917]. It also exempts all letters containing any agreement, not previously exempted, in respect of any merchandise or evidence of such, *which shall pass by the post* between merchants or other persons carrying on trade or commerce in Great Britain residing and actually being fifty miles distant from each other at the time of sending such letters.

The 9 Geo. 4, c. 14, exempts also all contracts for work to be done and materials to be provided in manufacturing goods.

The 55 Geo. 3, c. 184, exempts any agreement for the hire of labourers, artificers, or servants. It exempts all agreements between the master and mariners of any vessel for wages between English ports. (See, on the subject of contracts between them, 8 & 9 Vict. c. 116.)

In addition to these exemptions, the 9 Geo. 4, c, 14, s. 8, which extended the requirements of the Statute of Frauds, that agreements be in writing, has provided that "no memorandum or other writing made necessary by that act shall be deemed to be an agreement,

within the meaning of any statute relating to the duties of stamps." These agreements thus exempted relate to the ratification of contracts by infants, and contracts barred by the Statute of Limitations; to assurances of credit, and to contracts for work to be done and materials to be provided in manufacturing goods.

Thus, including all the agreements under 20*l.*, all those relating to sales, leases of small tenements, the hire of servants, and those last enumerated under the 9 Geo. 4, c. 14, it will be seen that a very large proportion of the most ordinary agreements are exempted from the necessity of being stamped.

Receipt stamps will be noticed in treating of the defences to actions on contracts.

All inland bills of exchange, drafts, orders, and promissory notes, do not fall within our province; but it may be briefly stated that they also are stamped under the schedule of the 55 Geo. 3, c. 184, *according to the well-known rates of duty, wherever they [*198] are for a sum certain, and are made payable to the bearer or to order, or be delivered to the payeee or some one on his behalf. This is the definition of a bill or note under the act. There is a special exemption for cheques on bankers transacting business within fifteen miles (according to 9 Geo. 4, c. 49, s. 15) of the place where they are issued, provided they are dated on or before the day on which they are issued, and specify the place where they are drawn. (Field v. Wood, 7 Ad. & Ell. 114; Dawson v. MacDonald, 2 M. & W. 26, 34 E. C. L. R.)

Promissory notes, which contain an agreement or terms amounting to one, are to be stamped as notes only if the entire sum or sums secured by them *are definite and certain;* otherwise as agreements, if of the proper value. (See instances in Bolton v. Dugdale, 4 B. & Adol. 620, 24 E. C. L. R.; Davies v. Wilkinson, 10 Ad. & Ell. 100, 37 E. C. L. R.)

Where the payment is contingent, as for goods ordered to be paid only if delivered, it is an agreement and not a note; Jarvis v. Wilkins, 7 M. & W. 412.

The subject of stamps on bills and notes is fully treated of in Serjeant Byles's "Practical Treatise on Bills," p. 74, 4th edit.

[*199] *LECTURE VIII.

PARTIES TO CONTRACTS—WHO ARE INCOMPETENT TO CONTRACT—INFANTS—WIVES.

I CONCLUDED in my last lecture the consideration of the contract itself, having spoken of the different sorts of contracts, of the consideration necessary to support a contract without specialty, and the effect of illegality in invalidating all contracts whatever. The next branch of the subject relates to the *parties to the contract.* (*a*) Now this, you will at once perceive, involves a double consideration,

First. Regarding the *ability* of the parties to the contract at all.

Secondly. Regarding their ability to enter into this or that particular sort of contract; for (as I shall have to explain more at length to you) there *are* persons who are allowed by the law to contract, but are not allowed to contract in the *same way as an [*200] ordinary individual; for instance, a corporation may contract *by deed*, but cannot, except in certain cases, which I shall presently specify, contract in any other manner. However, although these two conside-

(*a*) Parties to a contract are they between whom privity or mutuality of contract exists, see ante, p. 89, note. Questions often arise as to the person to whom credit is given; and who is said to be *privy* to it; in other words a party to it. Privity and mutuality as we have seen, are essential to make people parties to a contract. This privity or mutuality may be either direct or implied. It is direct when two persons contract together without the intervention of others; implied, where they contract by means of their agents, as we shall presently see.

rations are in themselves distinct, yet I think the better and more intelligible plan will be to deal with both of them together, specifying, one by one, those classes of persons regarding whose power to contract, the law contains any particular provisions, and pointing out, while treating upon each of them, in what cases they are disabled from entering into any contract, and in what cases, although allowed to contract, they are obliged to do so in a particular form.

Now I need hardly tell you that, *primâ facie*, any subject of the realm has power to enter into any contract not rendered illegal by the provisions of a statute or the common law; and therefore the cases to which I am now to advert are cases of complete or partial *disability;* cases in which a contract, which would have been good if entered into by an ordinary individual, is, when entered into by some particular individual, invalid, because that individual happens to fall within a class of persons who either do not possess *ability* to contract at all, or do not possess ability to contract in that particular way.

The first of these classes of persons to which I shall advert is that of *Infants.*

The general principle which regulates this branch of the law, is that until an individual has *attained the age of twenty-one, which period the [*201] law has selected as that at which a person of average capacity may fairly be supposed to have attained a sufficient experience to render his natural faculties fully available in the practical business of the world, it is necessary to shield him from the dangers of becoming a prey to others willing to take advantage of his inexperience; and as there are no means of doing this except by placing him under a limited disability to contract, he is accordingly placed under such limited

disability. But, inasmuch as to place him under a *total* disability might have the effect of preventing him from attaining objects not only not detrimental, but of the utmost advantage to him, he is, in order to avoid this risk, permitted to oblige himself to a certain extent, since otherwise he might be unable to obtain food, clothes, or education, though certain to possess at no very distant period the means of amply paying for them all.[1]

The general principle therefore is, that an infant may bind himself by a contract for what the law considers *necessaries*, but not by any other contract. We will consider, therefore, what it is that the law comprises under this denomination.

Now it is well established by the decisions that under the denomination *necessaries* fall not only the food, clothes and lodging necessary to the actual support of life, but likewise means of education suitable to the infant's degree, and all those *accommo- [*202] dations, conveniences, and even matters of taste which the usages of society for the time being render proper and conformable to a person in the rank in which the infant moves.[2] The question *what* is conformable—*what* is, in the legal sense of the word, *necessary*—is, in each case, to be decided by a jury; but

[1] The student may be referred, upon this subject generally, to the note to the cases of Tucker v. Moreland, and Vasse v. Smith, in the first volume of American Leading Cases, 251, where it is thoroughly examined, and the editor justly remarks, in the preface to that volume, that owing to a peculiar state of society among us, it has happened that the subject of the contracts of infants is capable of being illustrated from the American Reports, with a copiousness of examples and a certainty of principle which the English books do not exhibit. See also the notes *infra*.

[2] The law has always been so; Mackarall v. Bachelor, Cro. Eliz. 583; Hands v. Slaney, 8 Term, 578; Ford v. Fothergill, 1 Esp. 211.

these are the principles on which the judge ought to direct the jury that their decision should in each particular case be guided. It is impossible to understand this subject practically, so as to be able to say with tolerable certainty what would be the decision on this or that particular case, except by a familiarity with similar ones. I will therefore refer you to a number of decided cases, containing, in my judgment, the best illustrations of the matter; see Burghart v. Hall, 4 M. & W. 727; Peters v. Flemyng, 6 M. & W. 42; Hands v. Slaney, 8 T. R. 578; Coates v. Wilson, 5 Esp. 152; Harrison v. Fane, 1 M. & G. 550, 39 E. C. L. R.

The two cases of Peters v. Flemyng, 6 M. & W. 42, and Harrison v. Fane, 1 M. & G. 550, in one of which the infant was held liable, and in the other not, appear to me to furnish good examples of the distinctions of which I am speaking.

In Peters v. Flemyng, the plaintiff, who was a jeweller, brought an action of assumpsit against an infant, who pleaded his infancy by way of defence: the plaintiff replied that the goods, for the price of which he sued, were *necessaries* suitable to the estate, degree, and condition in life of the infant, on which issue was joined, and the *question tried was, whether they were or were not so. It turned out that the infant [*203] was the eldest son of a member of Parliament, who was, also, a gentleman of fortune, and that the infant was an undergraduate of the University of Cambridge, and resided at the University. The articles supplied, were four rings, a gold watch chain, and a pair of breast pins. The jury found that these articles were necessaries, and a motion was made to set aside the verdict as contrary to evidence. The Court of Exchequer, however, refused to interfere. Baron Parke said,

"It is perfectly clear that, from the earliest time down to the present, the word *necessaries* was not confined to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree of life in which he is; and therefore, we must not take the word '*necessaries*' in its unqualified sense, but with the qualification above pointed out. The question therefore is, whether there was any evidence to go to the jury that any of these articles were of that description. I think there are two that might fall under that description, namely, the breast-pin and the watch-chain. The former might be a matter either of necessity or ornament. The usefulness of the other might depend on this, whether the watch was necessary? If it was, then the chain might become necessary itself. Now, it is impossible that a judge could withdraw from the consideration of a jury whether a watch was necessary for a young man at college, and of the age of eighteen or nineteen to have? That being so, it is equally, as far as the chain is concerned, a question for the jury. There was therefore evidence to go to the jury. The true rule I take to be this, that all such articles as are *purely* ornamental are not necessary, and are to be rejected, because they can not be requisite for any one, and for [*204] such matters therefore an infant cannot be *made responsible. But if they were not strictly of this description, then the question arises, whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved. If they were, for such articles the infant may be made responsible."

On the other hand, in Harrison v. Fane, 1 Mann. & Gr. 550, *a*, an action was brought by a livery stable keeper for the hire of horses, the defendant pleaded infancy, and the plaintiff replied that the horses furnished were necessary for the infant, upon which issue was joined. It turned out on the trial that the defendant was a younger son of a gentleman who had once been a member of Parliament, and who had a family of five children. The defendant, the infant, kept a horse of his own, and sometimes hunted with his father's hounds. Under these circumstances, the judge who tried the cause thought that the horses

were not necessaries,(*a*) *and directed the jury accordingly; but the jury thought proper, [*205]

(*a*) So in Brooker v. Scott, 11 M. & W. 67. Soda water, oranges, and jellies, for an infant undergraduate at college, were held, *prima facie*, not to be necessaries, though they might have been shown to have been so. It is impossible not to perceive that these things are as suitable to the condition of a gownsman as a gold watch-chain, and in all probability quite as necessary as the gold breast-pin of Mr. Flemyng; but a remark made by Mr. Baron Parke shows that there was another reason for the decision in Brooker v. Scott. "This is the case of a young man resident in the town, and having from his college everything necessary for a person *in statu pupillari*."[1] But nevertheless the rule must be deemed to be somewhat narrowed in the latter case.

[1] The case of Brooker v. Scott, was certainly, to some extent, rested on the ground that such circumstances, on the part of the defendant, had not been shown as to warrant the leaving the question as to necessaries to the jury. (See the note to next page.) At the same time, the Court certainly did rely upon the fact of the defendant being *in statu pupillari*, and the more recent cases of Wharton v. M'Kenzie, and Cripps v. Mills, reported together in 6 Queen's Bench, 606, 48 E. C. L. R., may be said to have relied almost entirely on that ground. In the first of them, the claim was for fruit, marmalade, ices, soda water, &c., and the plaintiff not only proved his claim, but proved that during part of the time the defendant was under medical treatment for the lungs, &c., and ordered to take fruit, ices, &c., and that he associated with men of rank and fortune in the college, and that his father was governor of Ceylon. Mr. Justice Wightman therefore left it to the jury to say whether, taking into their estimation the rank and fortune of the defendant, the supply was extravagant, or such as might have been fairly supplied to a young man living in good society, and they having found for the plaintiff, the Court granted a new trial, on the ground of misdirection, Wightman, J., acknowledging that he ought to have pointed out that the term necessaries should be construed with reference to a person *in statu pupillari* at college, and supplied with what is generally necessary. Cripps v. Mills was a perfectly clear case, the articles being wild ducks, grouse, &c., furnished for entertainments given by defendant at college. In all three of these cases, the evils arising from the extent to which the credit system is carried at the Universities, evidently had a great effect upon the decisions.

nevertheless, to find their verdict for the plaintiff. The Court, considering it a perverse one, and contrary to law, set it aside, the L. C. J. saying that he would not say that horses could not be necessaries under any circumstances, but that no evidence was given that they were so in the present case.[1] With regard to the L. C. Justice's remark, I feel no difficulty in putting a case in which a horse might be considered necessary. Suppose, for instance, the infant were a young man in a genteel station of life, and had been ordered horse exercise by a medical attendant.(*a*)

(*a*) Coke says, "an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching and instruction, whereby he may profit himself afterwards," Co. Litt. 172 *a*. This doctrine was somewhat narrowed in a judgment of Haughton, J., 2 Roll. R. 271. "If an infant is the owner of houses, it is necessary to have them

[1] The result of the cases on both sides of the Atlantic seems to be, that unless the articles are, both as to quality and quantity, such as must be necessaries to any one, the burden of proof lies on the plaintiff to show such a condition of life of the defendant as might raise to the rank of necessaries, things which would otherwise be luxuries; Brooker v. Scott; Wharton v. M'Kenzie; Rainwater v. Durham, 2 Nott & M'Cord, 524; Rundle v. Keeler, 7 Watts, 239; Phelps v. Worcester, 11 New Hamp. 51; Bent v. Manning, 10 Vermont, 225; Grace v. Hale, 2 Humphreys, 27. When this has been shown, the question whether the articles *are* necessaries is one for the jury, subject, however, in some cases, to the direction of the Court, as, for instance, as was said in Wharton v. M'Kenzie, supra, "Suppose the son of the richest man in the kingdom to have been supplied with diamonds and race-horses, the judge ought to tell the jury that such articles cannot possibly be necessaries." And it would also seem that the articles must be to supply *personal* wants either for the body or mind; expenditures, therefore, for other purposes, as, for example, for alterations in an infant's real estate, however requisite, can never be considered as necessaries, they being regarded in the same light as articles furnished him for trade, the price of which cannot, as will be presently seen, be recovered as necessaries, however beneficial they may be to the business; Tupper v. Cadwell, 12 Metcalf, 563. And even in cases where

*There are, however, some species of contracts which the law considers it so imprudent on the [*206]

kept in repair, and yet the contract to repair them will not bind the infant; for no contracts are binding on infants, except such as concern their person." And this rule as to what is a personal necessary has been since recognised. And it had also been held that what is necessary for an infant's wife is necessary for himself; Turner v. Trusley, 1 Str. 168. Contracts by infants for things necessary for their children, bind them on the maxim of "*Persona conjuncta æquiparatur interesse proprio.*" Bac. Max. 67, Ed. 1639.

This doctrine derived a new extension in the late case of Chapple v. Cooper, 13 M. & W. 252. An infant widow was sued for the expenses of her husband's funeral, and was held liable. The reasoning by which the Court of Exchequer arrived at this conclusion is very instructive, and as the judgment delivered by Baron Alderson is a terse thesis on the whole law of contracts by infants, it will form a fitting summary of Mr. Smith's remarks, and a useful code for future reference. "It seems clear that an infant can contract so as to bind himself in those cases where it is necessary for him to have the things for which he contracts; or where the contract is, at the time he makes it, plainly and unequivocally for his benefit. It is with the former class that we are concerned. Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging, and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art, or trade, or intellectual, moral, and religious information may be a necessary also. Again, as man lives in society, the assistance and attendance of others may be a necessary to his well-being. Hence, attendance may be the subject of an infant's contract. Then the classes being established, the subject-matter and extent of the contract may vary according to the state and condition of the infant himself. His clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill; and the medicines will depend on the illness with which he is afflicted, and the extent

there can be no doubt that the articles are proper and necessary in themselves, yet as an overplus of goods, otherwise proper, ceases to be a supply of necessaries as to the excess, the jury should be directed to find for no more than is absolutely necessary, unless there is evidence to justify the quantity; Johnson v. Lines, 6 Watts & Serg. 84.

*part of an infant to enter into, that it will not allow him to bind himself by them under any [*207]

of his probable means when of age. So, again, the nature and extent of the attendance will depend on his position in society; and a servant in livery may be allowed to a rich infant, because such attendance is commonly appropriated to persons in his rank of life. But in all these cases it must first be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus, articles of *mere* luxury are always excluded, though luxurious articles of utility are in some cases allowed. So, contracts for charitable assistance to others, though highly to be praised, cannot be allowed to be binding, because they do not relate to his own personal advantage. In all cases there must be personal advantage from the contract derived to the infant himself. It is manifest, we think, that this principle alone would not be sufficient to decide the present case. For it would be difficult to say that there is any personal advantage necessarily derived to an infant from the mere burial of a deceased person. But there is another consideration which arises out of the circumstances of this case, which may, we think, materially affect the defendant's liability. This is the case of an infant widow, and the burial that of her husband, who has left no property to be administered. Now, the law permits an infant to make a valid contract of marriage; and all necessaries furnished to those with whom he becomes one person by or through the contract of marriage, are, in point of law, necessaries to the infant himself.[1] Thus, a contract for necessaries to an infant's wife and lawful children is used by Lord Bacon as one of the illustrations of the maxim, '*Persona conjuncta æquiparatur interesse proprio.*' (Bac. Law Maxims, p. 86.) 'If a man,' says Lord Bacon, 'under the years of twenty-one, contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliments or education.' Now there are many authorities which lay it down that decent Christian burial is a part of a man's own rights;

[1] So, indeed, an infant marrying an adult wife becomes liable on her contracts whether for necessaries or otherwise; for her contracts are valid, being made by an adult, and the husband's liability is an incident of the marriage contract, which is one that the law allows the infant to make; Butler v. Breck, 7 Met. 164; Roach v. Quick, 9 Wendell, 238.

*circumstances. For instance, an infant cannot *trade*, and consequently, cannot bind himself by any contract having relation to trade. We know, by constant experience, that infants *do*, in fact, trade, and trade sometimes very extensively. However, there [*208]

and we think it no great extension of the rule, to say that it may be classed as a personal advantage, and reasonably necessary to him. His property, if he leaves any, is liable to be appropriated by his administrator to the performance of this proper ceremonial. If, then, this be so, the decent Christian burial of his wife and lawful children, who are the *persons conjunctæ* with him, is also a personal advantage, and reasonably necessary to him; and then the rule of law applies, that he may make a binding contract for it. This seems to us to be a proper and legitimate consequence, from the proposition that the law allows an infant to make a valid contract of marriage. If this be correct, then an infant husband, or parent, may contract for the burial of his wife or lawful children; and then the question arises, whether an infant widow is in a similar situation. It may be said that she is not, because during the coverture she is incapable of contracting, and, after the death of the husband, the relation of marriage has ceased. But we think this is not so.

"In the case of the husband, the contract will be made after the death of the wife or child, and so after the relation which gives validity to the contract is at an end to some purposes. But if the husband can contract for this, it is because a contract for the burial of those who are *personæ conjunctæ* with him by reason of the marriage, is as a contract for his own personal benefit; and if that be so, we do not see why the contract for the burial of the husband should not be the same as a contract by the widow for her own personal benefit. Her coverture is at an end, and so she may contract; and her infancy is, for the above reasons, no defence, if the contract be for her personal benefit.

"It may be observed, that as the ground of our decision arises out of the infant's previous contract of marriage, it will not follow from it that an infant child, or more distant relation, would be responsible upon a contract for the burial of his parent or relative." [Since this decision, it has been held in the Common Pleas (Ambrose v. Kerrison, 20 Law Jour. R. 135, 4 Eng. Law & Eq. Rep. 361) that one who voluntarily pays an undertaker for the funeral expenses of a married woman living apart from her husband, is entitled to recover them from the husband in an action for money paid.]

exists a conclusive presumption of law that no infant under the age of 21 *can possibly have discre- [*209] tion enough for that purpose. You will see this laid down as a general rule in Whywell v. Champion, Str. 1083; Dilk v. Keightly, 2 Esp. 480; Goode v. Harrison, 5 B. & Ald. 147, 7 E. C. L. R., and Warwick v. Bruce, 2 M. & S. 205. Some singular consequences follow from this general rule: for instance, a bill of exchange is a mercantile contract, deriving, as I had occasion to explain in the last Lecture, its peculiar and distinguishing qualities from the law merchant. An infant, therefore, as *he* cannot be a merchant, in the eye of the law, is not allowed to bind himself by becoming a party to such an instrument; and thus, although a young man under the age of 21 may bind himself by a contract to pay money for his necessary dress, living, or education, yet, if he accept a bill for the price of these very articles, it will not bind him; although by accepting the bill he, in fact, would rather gain an advantage, inasmuch as he would be entitled to credit during the time the bill had to run; Williams v. Harrison, Carth. 160; Williams v. Watts, 1 Camp. 552.[1]

[1] Although in Ayliffe v. Archdale, Cro. Eliz. 920, a distinction was taken between a bond with a *penalty*, given for necessaries, and an obligation for the exact sum, yet it has been since repeatedly held, that an infant is neither liable upon a bond, bill, or note, given for necessaries, nor upon an agreement to pay a certain sum for them, on the ground that the infant is not to be precluded by the form of the contract, from his right of showing the actual worth of the articles; Earle v. Peale, Salk. 386, pl. 2; Probhart v. Knouth, 2 Esp. 472; Beeler v. Young, 1 Bibb. 519; M'Crillis v. Howe, 3 New Hamp. 348; or, as it should be more correctly said, because the only contract on which an infant is liable, is the *implied* contract for necessaries; Roof v. Stafford, 7 Cowen, 182; note to Tucker v. Moreland, supra. Nor is he liable for money lent to enable him to procure necessaries, on the ground that the contract arises upon the lending; and the

Again, he cannot bind himself by stating an account; for the law presumes that he has not sufficient capacity

subsequent application of the money for necessaries, cannot, by matter thus *ex post facto*, make the contract binding; Earle v. Peale, Walker v. Simpson, 7 Watts & Serg. 88. In equity, however, it is considered that where the money is thus actually applied, the lender may stand in the place of the infant's creditor, who has been satisfied, and be subrogated to his rights; Marlow v. Pitfield, 1 P. Wms. 559; Beeler v. Young, Walker v. Simpson, supra; Best v. Manning, 10 Verm. 230, and, at law, money *paid* at the infant's request for necessaries, may be recovered under a count for money paid; Randell v. Sweet, 1 Denio, 460; Coun v. Coburn, 7 New Hamp. 368; or, it was held, in Smith v. Oliphant, 2 Sand. S. C. R. 306, under a count for money lent and advanced.

But although a recovery may not be had upon a note given by an infant for necessaries, yet the mere fact of the note having been given, will not of course preclude the plaintiff from recovering the value of the necessaries which formed its consideration; Earle v. Reed, 10 Metcalf, 387, M'Crillis v. Howe, 3 New Hamp. 348; M'Minn v. Richmonds, 6 Yerger, 9.

The first of these cases, however, went somewhat further. The plaintiff's declaration contained a count on a promissory note given by an infant, and a count for goods sold and delivered. The plaintiff gave the note in evidence, and proved the sale, delivery, and value of the necessaries which formed its consideration. The remedy on the original contract was, however, barred by the Statute of Limitations, but a local statute in Massachusetts prevents, to some extent, the bar of the limitation act, in cases of notes attested by a witness and sued by the original payee, which was the case in this instance. Under these circumstances, it was contended on behalf of the defendant, that he was not originally liable on the note, under the principles just stated,—that never having ratified it, it was voidable, and useless therefore in that action for any purpose,—and that the plaintiff, when thrown back to the consideration of the note, could not recover by reason of the lapse of time. The Court, however, held, that, as a general principle, there was nothing to prevent an infant's liability on an express, as well as on an implied contract for necessaries, provided the consideration were always left open for proof as to reasonableness of amount, &c., and the Court saw no reason why the statute referred to, should not apply to the case of a note given by a minor, as well

to reckon; and that although the items of the account be all recoverable against him as for necessaries;(a) [*210] *Trueman v. Hurst, 1 T. R. 40; Ingledew v. Douglass, 2 Stark. 36, 3 E. C. L. R.; Oliver v. Woodroffe, 4 M. & W. 650.

This rule that an infant shall not be allowed to

(a) It is doubtful if this be longer so. In Williams v. Moor, 11 M. & W. 256, Mr. Baron Parke, in giving the considered judgment of the Court, said, speaking of the ratification of such a contract, "We can see no sound or sensible distinction in this respect between the liability of an infant on an account stated, and his liability for goods sold and delivered, or on any other contract. The contract of an infant for goods sold and delivered (not being necessaries) is as completely void as his contract on an account stated, if by the word void is meant incapable of being enforced. The plea of infancy will be a bar to any demand on the one contract as well as on the other." Although this decision turned upon the ratification of the contract after the infant came of age, and is not a direct decision that an account stated for necessaries may be maintained against an infant, nevertheless the doctrine laid down is broad enough to support that conclusion, and certainly puts contracts for goods and on the account stated, on the same footing. It may be doubted, therefore, whether the spirit of this judgment, combined with the progress of modern education, may not prevail over the somewhat antique hypothesis, that no one under twenty-one years old has capacity to reckon.

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as in the case of an adult. The previous case of Stone v. Dennison, 13 Pick. 1, had also taken the ground that an infant could be liable on a special contract for necessaries, in every case where the consideration was thus subject to proof, and it was said that a contrary rule might subject the infant to hardship in cases where, by the terms of the contract, the price of the necessaries was less than could be recovered on a *quantum valebat*. It has, however, been observed of the first of these cases (by Mr. Wallace, in the note to Tucker v. Moreland, supra), that it is "inconsistent with principle, as, in a count on a special and express contract, all or none should be recovered," and it may be remarked of the reason given in Stone v. Dennison, that the general rules of law as to infants are made for their protection, and lose their application when their reason ceases; Jefford's Adm. v. Ringgold, 6 Alabama, 584. See note infrâ.

bind himself by contracts made in trade, although looking at it with regard to the present state of education and society, it may appear somewhat unreasonable in its operation, yet, looking at it upon general principles, it is capable of being defended by some strong arguments. The consequences of failure in trade are so fatal, not merely to the property, but often to the reputation of the unsuccessful trader. A failing trader is so often, in his struggles to save himself from utter shipwreck, and to keep up a good *appearance in the sight of the world, induced to have recourse to disingenuous and reprehen- [*211] sible expedients, that, possibly upon reflection, it may be thought not unwise to guard young persons up to a certain point against the accidents and temptations of mercantile speculation, and to insure to them as far as possible, the advantages of starting fair in life with fortunes unimpaired and characters unblemished. How grievous would be the situation of a young person beginning life at one-and-twenty an uncertificated bankrupt. Now, against such a chance, the law as it now stands effectually guards him; for, as an infant cannot trade, he cannot become bankrupt; and it has been decided that a fiat against him is void; Belton v. Hodges, 9 Bing. 365, 23 E. C. L. R. Again, the general principle being that an infant shall be bound by no contract which is not beneficial to him, it is held that he can engage in none in which the performance of the contract is secured by a penalty; for that it cannot be for his advantage to become subject to a penalty; and, therefore, though the old books lay it down that he may bind himself by a deed to pay for necessaries,(a) yet it is clearly settled that he cannot

(a) See Cockshott v. Bennett, 2 T. R. 766, per Ashurst, J.; S. P. Tapper v. Davenant, Bull. N. P. 155.

do so by a bond containing a penalty;[1] Ayliff v. Archdale, Cro. Eliz. 920; Corpe v. Overton, 10 Bing. 252, 25 E. C. L. R.[1] A variety of other examples might be given; but I think what I have said *sufficient [*212] to explain the general nature of an infant's liability and exemption from liability.

Now, therefore, the general rule being that an infant cannot bind himself except for necessaries, next comes the question—Suppose he do, in fact, enter into a contract for something not falling under that denomination, what will be the consequence? In the first place, no action can be maintained against him during his infancy upon any such contract, nor afterwards, unless he elect to confirm it. But, in the second place, the contract is not absolutely *void* but voidable;(*a*) and, therefore, when he arrives at the age of twenty-one, he may confirm it, and, if he do so, he will become liable to an action upon it.

I will exemplify this by the case of Goode v. Harrison, which I have already cited from 5 B. & A. 147, 27 E. C. L. R. A person of the name of Goode entered into a trading partnership with an infant under the age of twenty-one, called Bennion; a third person, named Harrison, supplied them with goods, and after Bennion

(*a*) In Thornton v. Illingworth, 2 B. & Cr. 824, 9 E. C. L. R.; Bayley, J. says that, "in the case of an infant, a contract made for goods for the purposes of trade is absolutely void, not voidable only;" and Littledale, J., says the same. Parke, B., however, in Williams v. Moor (supra), holds that the promise is not void *in any case*, unless the infant chooses to plead his infancy. See the next note, p. 214. [Reed v. Batchelder, 1 Met. 559; Aldrich v. Grimes, 10 N. Hampshire, 194; and the contract is voidable only by the infant himself, or in case of his death, his personal representatives, and not by sureties or strangers; Roberts v. Wiggin, 1 New Hamp. 73; Oliver v. Hondlet, 13 Mass. 237; Parker v. Baker, 1 Clarke's Ch. 136.]

[1] See note to page 209, supra.

came of age, he took no step to signify to the world that he disclaimed the connexion with Goode, but, on the contrary, allowed it to be supposed that he was *still in partnership with him. After this, Harrison supplied Goode with more articles, [*213] and brought an action against him for the price, jointly with Bennion, as a co-defendant. Bennion set up his infancy, and urged that, as an infant cannot bind himself by a contract made in the course of trade, his agreement, while under age, to become Goode's partner was not binding upon him, and consequently, that, not being Goode's partner, he was not liable for the articles supplied to him. On the other hand, it was urged that admitting the partnership contracted while he was an infant to be voidable, it was nevertheless in his option, when he arrived at his full age of one-and-twenty, to adopt and confirm it: that by his conduct he had done so; and that consequently he was liable for the goods supplied afterwards. The question was argued, as you may suppose, with great ability, the counsel being Baron Parke and the late Mr. Justice Littledale. The court decided in favour of the plaintiff. The principle is clearly and strictly laid down in the judgment of Mr. Justice Bayley—

"It is clear," said his lordship, "that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy; but still he may be a partner. If he is in point of fact a partner during his infancy, he may, when he comes of age, elect, whether he will continue that partnership or not. If he continues the partnership, he will then be liable as partner.[1] If he dis-

[1] A question may here arise as to the extent of the liability for the previous debts of the firm, and in Miller v. Sims, 2 Hill (S. C.), 479, it was held, that inasmuch as in general one partner could bind the firm by contracts made without the knowledge of the other, to say that one may enter into or affirm a partnership without incurring these liabilities, would be to say that one may affirm a contract of

solve the partnership, and, if when of age, he take the proper means [*214] *to let the world know that the partnership is dissolved, then he will cease to be a partner."

It is easy to apply this mode of reasoning to any other sort of contract: see also Southerton v. Whitelock, 1 Str. 690. However, in order to prevent persons from inconsiderately confirming contracts made by them during infancy, and to obviate the danger of attempts to foist such confirmation on them by false evidence, it is enacted by 9 Geo. 4, c. 14, s. 5, that no action shall be maintained whereby to charge any person upon any promise made, after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made, by some *writing*, signed by the party to be charged therewith. See, for a decision on this Act, Hartley v. Wharton, 11 Ad. & E. 934, 39 E. C. L. R.(*a*)[1]

(*a*) In the cases where, as we have seen, it has been questioned, whether contracts by infants were not void *ab initio*, it has also been held that they were consequently incapable of ratification. In Williams v. Moor, 11 M. & W. 256, the point was raised, whether a contract on the account stated was not void, and the subsequent ratifica-

partnership, and disaffirm that which is inseparably incident to it, and the defendant, who had, by his acts of receiving partnership funds, &c., affirmed a partnership, begun while he was yet an infant, was therefore held liable on a note given by the other partner, before such affirmation, of which he had no knowledge, and which he refused to pay when informed of it. A decision, apparently to the contrary, in Crabtree v. May, 1 B. Monroe, 289, will, on examination, be found to have turned on the insufficiency of the replication.

[1] It has been seen in a former part of these lectures, that any acknowledgment, not inconsistent with a promise to pay, such as a partial payment, will be sufficient to remove the bar of the Statute of Limitations. It is not so, however, with respect to the ratification of con-

Now, then, such being the effect of an infant's *contract with regard to the infant himself, it remains only to say a word or two as to their [*215]

tion therefore was of no avail; but the Court of Exchequer held, as before stated, that there was just the same reason why an infant coming of age should be allowed to confirm an account stated, as to make himself liable on any other contract which he might have entered into during his infancy. Mr. Baron Parke, moreover, held, as we have seen, that the promise is not void in any case; and this is certainly now the prevailing opinion.

The ratification sets up and gives validity to an otherwise invalid contract; it "removes the bar of infancy;" it is not therefore of the nature of a new contract; for the only consideration is the moral duty arising from the previous transaction; and that is no consideration at all (Jennings v. Brown, 9 M. & W. 501, per Parke, B.); but it gives legal effect to the original obligation, and to all its concomitants. The question of consideration therefore does not arise on the ratification, but relates to that of the old contract, upon which the plaintiff should declare, and not upon its revival, according at least to the form of pleading in Cohen v. Armstrong, 1 M. & Sel. 724; Thornton v. Illingworth, 2 B. & Cr. 824, 9 E. C. L. R.; and Hartley v. Wharton. It is not easy to see how the want of consideration for the new promise could be otherwise got over in the face of Monckman v.

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tracts made during infancy. There must either be a direct affirmation (as in the case cited, supra, by continuing the business, or, in the case of a chattel, by retention of the possession, selling it again, or the like; see Lawson v. Lovejoy, 8 Greenleaf, 405; Aldrich v. Grimes, 10 New Hampshire, 194; Kline v. Beebe, 6 Connect. 494; Boyden v. Boyden, 9 Metcalf, 519; Thomasson v. Boyd, 13 Alabama, 419; Merreweather v. Herran, 7 B. Monroe, 162); or an express promise to pay, made voluntarily, with full knowledge of the liability thus incurred, made to the party himself or his agent, and not to a mere stranger having no interest; Hinely v. Margaritz, 3 Barn. 428; Ford v. Phillips, 1 Pick. 202; Pierce v. Tobey, 5 Met. 168; Hale v. Gerrish, 5 N. Hampshire, 374; Millard v. Hewlett, 19 Wendell, 301; Wilcox v. Roath, 12 Conn. 551; a mere acknowledgment, or partial payment will not suffice; Goodsell v. Myers, 3 Wendell, 481; Robbins v. Eaton, 10 N. Hamp. 561; Hinely v. Margaritz, supra, for the law will imply no promise in the case of an infant, as has been seen, except for necessaries.

[*216] *effect on the other contracting party. And, as to him, the rule is, *that he is bound, though the infant is not;* for, to use the words in which the rule is stated in Bacon's Ab., Infancy, I. 4,—"Infancy is a personal privilege of which no one can take advantage but the infant himself; and, therefore, though the contract of the infant be voidable, yet it shall bind the person of full age; for, being an indulgence which the law allows infants to secure them from the fraud and imposition of others, it can only be intended for their

Shepherdson, 11 Ad. & Ell. 415, 39 E. C. L. R., which decided that a good consideration once forfeited could not be revived by a parol promise founded upon a moral obligation. There is nothing in the terms of the statute to supply the want of consideration; or at all to help the action; it simply requires that evidence of the ratification shall be in writing. The case of an acknowledgment to take a debt out of the Statute of Limitations appears in this respect analogous; in that case the plaintiff declares not on the acknowledgment, but on the original contract; see Leaper v. Tatton, 16 East, 420. If this be a correct view of the case where the defendant pleads infancy, the plaintiff, instead of a new assignment, replies the ratification, as in Hartley v. Wharton, 11 A. & E. 934, and Cohen v. Armstrong. [Since this note was written, the view thus suggested was expressly taken in Harris v. Wall, 1 Excheq. 129.] It has been held that where the infant has given a bond, it cannot be ratified by the usual memorandum, so as to give a right of action upon it; for an instrument under seal can only be confirmed by one of as high a nature. Baylis v. Dyneley, 3 M. & Sel. 477.[1] See as to the evidence of the ratification, p. 79, ante.

[1] But see the comments on this case, in 1 Amer. Lead. Cases, 259, where it is shown, that inasmuch as it is well settled in this country that an infant's bond is not void, but only voidable, the ratification does not operate to impart to it anything which did not exist in it before, but merely to take from it its quality of voidableness, and hence that a specialty may be confirmed by a parol promise after full age. In the note referred to, the student will also find a classification of the cases as to what acts will amount to a confirmation of a sale of real estate made during infancy.

benefit, and is not to be extended to persons of the years of discretion, who are presumed to act with sufficient caution and security. And, were it otherwise, this privilege instead of being an advantage to the infant, would, in many cases, turn greatly to his detriment." Thus, for instance, in Holt v. Ward, 2 Strange, 937, a gentleman of full age had promised to marry a minor. It was decided that she might maintain an action against him for breach of promise, though he could not have done so had she refused to perform her side of the contract.[1] Again, in Warwick v. Bruce, 2 M. & S. 205, an infant was allowed to maintain an action on a contract to purchase a crop, on which no action could have been maintained against him.[2]

I now come to the second class of persons on whose

[1] The case was four times argued; see the report in Fitzgibbon, 175, 275; and the decision was recognised by Lord Hardwicke, in Harvey v. Ashley, 3 Atkins, 610, and on this side of the Atlantic, the decisions in Hunt v. Peake, 5 Cowen, 475; Willard v. Stone, 7 Id. 22, and Carman v. Ashbury, 1 Marshall, 78, were based on its authority.

[2] But liberal as is the law towards infants, it does not allow them to retain the possession of property, and still repudiate the contract by which that possession has been obtained; and as by the avoidance of the contract the property revests in the vendor, the latter may bring trover, replevin, or detinue; Mills v. Graham, 4 Bos. & Pul. 140; Badger v. Phinney, 15 Mass. 359; Boyden v. Boyden, 9 Met. 519; Jefford v. Ringgold, 6 Alab. 544. And so with respect to real estate; he cannot disaffirm securities given for the purchase money, and still claim the land under his deed; Weed v. Beebe, 21 Vermont, 495. If, however, the goods have been wasted, sold, or otherwise disposed of by the infant, after the coming of age, these acts, as we have seen, amount to an affirmation of the contract, and he will then, the bar of infancy being thus removed, be liable upon the contract; but if the goods have been wasted or sold during infancy, neither trover nor detinue will lie, for a refusal after age to deliver, when he has not the goods, is no conversion; Fitts v. Hall, 9 New Hamp. 441; Boody v. M'Kenney, 23 Maine, 517; and

capacity to contract I think it necessary to observe: I mean that of *married women.*

Now, a contract by, or with a married woman, [*217] *is one of two sorts. It is either a contract which she entered into *before* her marriage, and which continued in existence afterwards; or, it is a contract which she entered into subsequently to her marriage.

Now, with regard to the former description of contracts, I will dispose of them in a few words. Upon the marriage, the benefit of, and the liability to the wife's contracts, made before marriage, vest in the husband, and continue vested in him during the continuance of the marriage. If she die before they are enforced, and he survive her, he is entitled to the benefit of such contracts, not in his own right, but as her administrator;[1] and liable to be sued on them, not

detinue does not lie where the goods have been parted with in a manner authorized by law; Pool v. Adkisson, 1 Dana, 110.

Upon the subject of an infant's liability for torts, the manner in which he is made a party to an action, and many other important branches of this subject, the student is again referred to the note to Tucker v. Moreland, 1 Amer. Lead. Cas.

[1] Collins v. Hoxie, 9 Paige, 81; Hunter v. Hallett, 1 Edward's Ch. 388; Coleman v. Waples, 1 Harrington, 196. So that if the husband die without having taken out letters of administration, his administrator cannot recover her choses in action, but administration must be taken out to the wife; Betts v. Kimpton, 2 Barn. & Adolph. 273, 22 E. C. L. R.; and Lord Tenterden well observes in that case that the question is not who is actually entitled to the property, but who has the right to sue for it; for although the latter right is vested in the representative of the wife alone, yet he is considered in equity as a trustee for the representative of the husband; Squib v. Wyn, 1 P. Wms. 368; Stewart v. Stewart, 7 Johns. Ch. R. 229. If, however, the husband has taken out letters of administration to his wife's estate, and die before its full administration, *his* representative is, in the absence of any statutory enactment, entitled to administration *de bonis non;* Donnington v. Mitchell, 1 Green's Ch. R. 346.

in his individual capacity, but as his wife's administrator. If she survive him, her right to the benefit of, or liability upon such contracts revives, assuming always that nothing has been done to put an end to the contract during the continuance of the marriage.[1] (See for these points, Ramsey v. George, 1 M. & S. 180; Betts v. Kimpton, 2 B. & A. 273, 22 E. C. L. R.;

[1] Blount v. Besland, 5 Vesey, 315; Schuyler v. Hoyle, 5 Johns. Ch. 196; Hayward v. Hayward, 20 Pick. 517; Strong v. Smith, 1 Met. 476; Weeks v Weeks, 5 Iredell's Eq. R. 111, where the previous cases in North Carolina are noticed. The result of these principles, then, briefly is, that for all the debts of the wife, contracted before marriage, no matter how improvident they may be, the husband is personally liable during the coverture, and no longer, and this, though he may not have received a cent by her; and, on the other hand, upon her death, his personal liability for her debts contracted before marriage is wholly wiped out, though he may have received a fortune by her. The apparent injustice of this latter rule, than which nothing is better settled (Tabb. v. Boyd, 4 Call, 453; Buckner v. Smyth, 4 Desaussure, 371; Witherspoon v. Dubose, 1 Bailey's Ch. R. 166), has often been strongly urged, and equity been invoked to modify it, and Lord Nottingham is reported to have said with some earnestness that "he would alter the law on that point," (Freeman v. Goodham, Ch. R. 295;) but in Heard v. Stamford, Cas. temp. Talbot, S. C. 3 P. Wms. 411, the Chancellor said, "It is extremely clear that by law the husband is liable for the wife's debts only during the coverture, unless the creditor recovers judgment against him in the wife's lifetime, and I do not see how anything less than an act of Parliament can alter the law. If I relieve against the husband because he had sufficient assets with his wife wherewith to satisfy the demand in question, by the same reason where a *feme*, indebted *dum sola*, marries, bringing no fortune to her husband, and judgment is recovered against the husband, after which the wife dies, I ought to grant relief to the husband against such judgment, which yet is not in my power, consequently there can be no ground for a court of equity to interpose in the present case; and if the law, as it now stands, be thought inconvenient, it will be a good reason for the legislature to alter it, but till that is done, what is law at present must take place." See to the same effect the remarks of Lord Redesdale, while Chancellor of Ireland, in Adair v. Shaw, 2 Schoales & Lefroy, 263.

Mitchison v. Hewson, 7 T. R. 350, Com. Dig., Tit. Baron and Feme, N.) (*a*)

[*218] *During the marriage the husband may, as I have said, sue or be sued upon his wife's contracts, made while she was a single woman; but if he

(*a*) A new feature arose in the later case of Sherrington v. Yates, 12 M. & W. 855, where the assignees of a bankrupt brought an action in their own names on a promissory note made to the wife of the bankrupt *dum sola* [and in the Court of Exchequer were held entitled to recover]. The case was carried to the Exchequer Chamber, and it was there adjudged [reversing the judgment below] (after declaring the exact doctrine expressed above by Mr. Smith, to the effect that choses in action, of which a promissory note is one, not reduced into possession, survive to the wife) that "the assignees of the husband, by bringing the action in their names alone, have deprived the wife of this possible benefit; for, as she is not a party to this record, she cannot make any suggestion upon it, or entitle herself to any advantage upon her husband's death. And as the assignment in bankruptcy has not the effect of reducing into possession a chose in action belonging to the wife, so as to destroy her rights of survivorship (Mitford v. Mitford, 9 Ves. 87), and again, as the Bankrupt Laws do not profess to vest any property in the assignees other than that which was the property of the bankrupt himself, the case of reputed ownership excepted, it would follow that the assignees cannot deprive the wife of any interest which she has in a chose in action, nor of any contingent benefit or advantage which might accrue to her in the endeavour to reduce such chose in action into actual possession.[1] Upon principle, therefore, we think that no more passes to the assignees than the husband himself had; and if he had no right by law to sue alone, without joining the wife, so neither would the assignees. We are not called upon to express our opinion whether the action should be brought in the joint names of the assignees and the wife. The Vice Chancellor of England, in the case of Pierce v. Thorneley, 2 Sim. 167, has, however, expressly stated such to be his opinion, and as such allegations must appear upon the record, in the case of an action upon a promissory note given before intermarriage, as are necessary to show the grounds upon which such a joinder takes place, it is sufficient to say, that at present we can perceive no objection to such a form of action."

[1] Shay v. Sessamen, 10 Barr, 432; Eshelman v. Sherman, 1 Harris, 563.

sue, he must join her as a co-plaintiff; and, if he be sued, she must be joined as a co-defendant.[1] Rumsey v. George, 1 M. & S. 180; Milner v. Milner, 3 T. R. 631; Pittam v. Foster, 1 B. & C. 248, 8 E. C. L. R.

Such is shortly the state of the law regarding *the effect of marriage on the contracts made [*219] by the wife while single. There is one case, indeed, in which the husband may sue upon a contract made with her while single, without joining her as a co-plaintiff. This is where a bill of exchange or promissory note has been given to her; in which case it has been decided that the marriage operates as an endorsement of it to the husband, and that he can sue alone upon it; M'Neilage v. Holloway, 1 B. & A. 218, 20 E. C. L. R.(*a*)[2]

(*a*) Selwyn lays it down broadly that in an action on a *bond* given to the wife *dum sola*, husband and wife *must* join. And in a note prudently remarks, "Until the doubts which hang over this question are removed by a solemn adjudication, the best way of proceeding for the recovery of a chose in action of the wife *dum sola*, is to bring the action in the names of husband and wife; on the propriety of

[1] And this even although the husband make a subsequent promise; unless, of course, such promise be based upon a new consideration of benefit to himself, or inconvenience to the creditor, Waul v. Kirkman, 13 Smedes & Marsh. (Miss.) 599.

[2] But this decision of Lord Ellenborough has been overruled, and it is now settled that a promissory note is, in the ordinary course of things, a chose in action, and there is nothing to take it out of the common rule that choses in action survive to the wife after the death of her husband, unless he has reduced them into possession; and it is believed to be a rule without exception that a husband can *not* sue alone to recover any chose in action belonging to the wife *before* marriage, Fenner v. Plasket, Moore, 422; Richards v. Richards, 2 Barn. & Adolph. 447, 22 E. C. L. R.; Gates v. Maddely, 6 Mees. & Wels. 427; Sherrington v. Yates, 12 Id. 855; Hart v. Stephens, 6 Queen's Bench, 937, 51 E. C. L. R.; Morse v. Earl, 13 Wendell, 271; Clapp v. Stoughton, 10 Pickering, 470; Johnston v. Pastern, Cam. & Nor. (N. Car.) 464.

Next as to contracts entered into by a married woman subsequently to her marriage. It is a general rule that a married woman cannot bind herself by any contract made during the coverture; not as in the case of an infant, from any presumption of incapacity, but because she has no separate existence, her husband and she being in contemplation of law, but one person. The great case on this subject is Marshall v. Rutton, 8 T. R. 545, which was decided by all the judges in

which method a question cannot be raised." (1 Sel. Nisi Prius, 308, note, where the old cases will be found collected.)[2]

[1] The history of the course of decision which led to this case may be interesting. It was thought to be well settled in the law that a married woman eloping from her husband could not contract debts, and be suable alone, Hatchett v. Baddeley, 2 W. Black, 1079, even although she might have a separate maintenance, Lean v. Schutz, Id. 1195. It was there said, that there was no instance in the books of an action being sustained against the wife, the husband living at home, and under no civil disability. Soon after, Lord Mansfield foreshadowed in Ringsted v. Lady Lanesborough, and Barwell v. Brooks, 3 Douglass, 197, 371, the opinion which he definitely pronounced in the well-known case of Corbett v. Poelnitz, 1 Term, 5, where he, while acknowledging the principle of the old law, remarked that such things as deeds of separation and separate maintenances were unknown to it, and that inasmuch as new customs and manners occasion exceptions to old rules, the question was, "If a married woman living apart from her husband, having, by agreement,

[2] The proposition as laid down by Mr. Selwyn is amply supported by authority; Milner v. Milner, 3 Term, 631; Rumsey v. George, 1 Maule & Sel. 176; Sherrington v. Yates, 12 Mees. & Welsb. 855, and see the cases cited below. It must be remembered, however, that in an action on a bond, note, or other chose in action given to the wife *after* coverture, the husband and wife *may* join (infra, p. 222), or he may sue alone; Burrough v. Moss, 10 Barn. & Cress. 558; Templeton v. Crane, 5 Greenl. 417; Thompson v. Ellsworth, 1 Barb. Ch. R. 624; Woodley v. Findlay, 9 Alab. 716; Young v. Moore, 1 Strobhart, 48; Sutton v. Warren, 10 Metcalf, 451; Tallmadge v. Grannis, 20 Connect. 296.

England, except Mr. Buller, and is one of the last, perhaps the very last instance of the practice which was so common in the early *ages of the law, [*220] and according to which, any one of the superior courts before which a very important point arose, requested the assistance of the judges of the other two to hear it discussed, and to assist in deciding it. (See also Lewis v. Lee, 3 B. & C. 291, 10 E. C. L. R.; Faithborne v. Blaquire, 6 M. & S. 73.) In a word, the person who contracts with a married woman, as far as any right in a court of law is concerned, relies upon her bare word; for she is not recognised there as a person capable of binding herself by any contract whatever,[1] save only in one or two excepted cases, which I will now specify.

a large separate maintenance settled upon her, continuing notoriously to live as a single woman, contracting and getting credit as such, and the husband not being liable, should she not be sued as a *feme sole?*" and he held that she should. But this decision seems to have given almost immediate dissatisfaction (see the remarks of Lord Alvanley, then Sir Pepper Arden, in Hodge v. Price, 3 Vesey, 443), and in several subsequent cases it was treated as having by no means decisively settled the law; Compton v. Collinson, 1 H. Black. 350; Ellah v. Leigh, 5 Term, 679; Clayton v. Adams, 6 Id. 604; until at last the case of Marshall v. Ruston replaced the principle on its original footing, holding that such a doctrine would contravene the general policy of the law, and would, without dissolving the bond of marriage, place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married.

[1] While it is correct that a married woman cannot, by a contract made during coverture, bind *herself*, yet the *husband* may be bound by contracts made by her, in cases where it appears that she acted as his agent, or under an authority from him, express or implied. The rules upon this subject are considered infra, in the note to page 286.

It is well settled that a married woman cannot bind herself to answer in damages by reason of her joining with her husband in

1. The first of these is where her husband is civilly dead: for instance, where he is under sentence of transportation. In such a case, to prevent her from contracting would be to deprive her too of all civil rights, since, the husband being civilly dead, is no longer capable of contracting for her. (See ex parte Franks, 7 Bing. 762, 20 E. C. L. R.; Marsh v. Hutchinson, 2 B. & P. 231.) This is a very old doctrine, having been first established in the 2d Hen. 4., in the Year Book of which year, we find that Belknap, the Lord High Treasurer, was banished to Gascony till he should obtain the King's favour, and his wife, Lady Belknap, brought an action in the Common Pleas, which seems to have been the first instance of such a proceeding by a married woman; for it struck the lawyers of those days with so much surprise that [*221] they commemorated *it by a Latin distich, which Lord Coke has thought it worth his while to preserve in the 1st Institute. It is in the old monkish style, and is not only in Hexameter measure, but in rhyme also, the words are

> 'Ecce modo mirum, quod fœminâ fert breve Regis,
> Non nominando virum conjunctum robore legis."

2. Another case, is where the husband is a foreigner, belonging to a country at war with Great Britain. In such case, as he cannot lawfully contract or sue in

covenants in a deed conveying her estate, but it seems not to be exactly determined whether those covenants will have any effect upon her by way of estoppel, such an effect having been recognised in some cases (Hill's lessee v. West, 8 Ohio, 226; Marvie v. Sebastian, 4 Bibb. 436; Fowler v. Shearer, 7 Mass. 21; Nash v. Spofford, 10 Metc. 192), and denied in others (Jackson v. Vanderheyden, 17 Johns. 167; Carpenter v. Schermerhorn, 2 Barb. Ch. 314; Wadleigh v. Glines, 6 N. Hamp. 18; Den v. Desmarest, 1 Zabriskie, 541.)

England, it seems to be admitted that his wife may do so as if she were unmarried. See Barden v. Keverberg, 2 Mee. & W .65.[1]

By the custom of the city of London, a married 3

[1] Derry v. Duchess of Mazarine, 1 Raym. 147. This exception, however, to the general rule which denies the efficacy of the contracts of married women, is not confined merely to the case of the wife of an *alien enemy*, nor indeed, as it would seem by the late authorities, at least in this country, to the case of an alien at all. Some distinctions were at one time taken, which have not latterly been recognised. Thus it has been held, that where the husband was a foreigner, and had never been in the country, the wife could sue and be sued on her contracts; Walford v. Duchess of Pienne, 2 Esp. 554; De Gallion v. L'Aigle, 1 Bos. & Pull. 357; Gregory v. Paul, 15 Mass. 30; Robinson v. Reynolds, 1 Aiken, 174; but not where the husband had ever resided in the country; Kay v. Duchess of Pienne, 3 Camp. 123; or was a natural born subject, though he might have deserted her and resided abroad for years; De Gallion v. L'Aigle, Boggett v. Frier, 11 East, 301; Franks v. Duchess of Pienne, 2 Esp. 587. The distinction thus taken between an alien and a subject, seems to have proceeded on the supposition that in the case of the latter, there might be an *animus revertendi*, but the later cases have judiciously neglected such a distinction, and it is now well settled, at least in this country, that where the wife has been left by her husband—has traded as a feme sole—and has obtained credit as such, she is liable for her debts, and on the other hand may acquire property of her own; Rhea v. Rheuner, 1 Peters, 105; Bean v. Moyan, 4 M'Cord, 148; Starret v. Wynn, 17 Serg. & Rawle, 133; Gregory v. Pierce, 4 Metcalf, 478; Arthur v. Broadnax, 8 Alab. 557; James v. Stewart, 9 Id. 835; and it perhaps would not be inconsistent with reason, to lay down as a rule, that where the wife has obtained credit as a feme sole, and her husband is absent at the time of the contract, and until and at the time of the bringing of the suit, a recovery may be had against her. It is doubtful, however, whether the English cases have to any extent abandoned the distinctions formerly taken by them, as in Barden v. Keverberg, cited by the lecturer, Mr. Baron Parke said, that a party seeking to make a wife liable, "must make out that the husband was an alien, that he was resident abroad, and never in this country, and that the defendant represented herself as a feme sole, or that the plaintiff dealt with her, believing her to be so."

woman is allowed to be a trader in her usual capacity, and may sue alone in the city courts on contracts made by her in the course of such trade; but it would seem that even in this case, if she were to bring an action in the courts at Westminster, it would be necessary to make her husband a party to it.[1] This subject is learnedly discussed in Beard v. Webb, 2 B. & P. 93.

Now, so far with regard to a married woman's right to bind herself by contracts. But with regard to her power of taking advantage of contracts made by other persons with her, the rule is somewhat different; for, it has been decided that, if a contract be made with the wife on good consideration during the marriage, [*222] the *husband may, if he please, take advantage of it, and recover in an action on it, in which action he may join his wife as a co-plaintiff. And if he die without taking any such step, the right to sue upon it will survive to the wife. One of the earliest authorities on this subject is Brashford v. Buckingham, Cro. Jac. 77, where the wife had undertaken to cure a wound for the sum of ten pounds, which the patient was ungrateful enough not to pay, and after she and her husband had recovered judgment in an action of debt, a writ of error was brought in the Exchequer Chamber on the ground that the married woman could not sue. But the court said that being grounded on a promise made to the wife upon a matter arising upon her skill, and on a performance to be made to the

[1] In Pennsylvania, South Carolina, and perhaps other States, the custom of London as to feme sole traders, has been imitated by statutory enactments; see Burk v. Hinkle, 2 Serg. & Rawle, 189; Jacobs v. Featherstone, 6 Watts & Serg. 346; Newbiggen v. Pillans, 2 Barr, 162; Smith v. Taylor, 4 M'Cord, 413; Hobart v. Lemon, 3 Richardson, 131; Blythewood v. Everingham, Id. 285.

wife, she is the cause of the action, and so the action brought in both their names is well enough, and such action shall survive to the wife. Wherefore the judgment was affirmed. On the same principle, if a bond be made payable to her, she and her husband may sue upon it; Day v. Padrone, 2 M. & S. 396, note.(*a*) So if a promissory note be *payable to her: Phil- [*223] liskirk v. Pluckwell, 2 M. & S. 393. And there is a very curious case of Richards v. Richards, 2 B. & Adol. 447, 22 E. C. L. R., in which a married woman took a note from her own husband and two other persons. And it was held, that though no one could have sued on it in his lifetime, yet, that, after his death, she might sue the two surviving makers, and that decision is approved of in Gaters v. Madely, 6 Mee. & W. 423, which is, I believe, the last case on the subject. In that case a promissory note was given to a married woman during the coverture. She survived her husband, and having, afterwards, herself died before the

(*a*) Upon a deed *inter partes*, made during coverture, the effect of the authorities seems to be that, *prima facie*, the right of action on the covenant belongs to the wife, and would survive to her on the death of the husband, without his having reduced it into possession, by dissenting from her right in some operative way, as by taking a new security, so as to vest the interest in himself. Therefore, the coverture of the plaintiff in such a case cannot be pleaded in bar, and in an action brought by the plaintiff, the non-joinder of the husband can be pleaded only in abatement. (Bendix v. Wakeman, 12 M. & W. 97.)[1]

[1] Coverture may be pleaded in abatement or in bar, according to circumstances; where the defence goes to the root of the demand, as, for instance, in an action on a bond given by the wife, it may be pleaded in bar; Steer v. Steer, 14 Serg. & Rawle, 379; but where the defence is merely the disability of the wife to sue in her own name, it must be pleaded in abatement; Perry v. Boileau, 10 Serg. & Rawle, 208; Lyman v. Albee, 7 Vermont, 508.

note was paid, it was held, that her executor was entitled to maintain an action upon it. The rule is very clearly laid down in the judgment of Baron Parke:

"This," said his lordship, "is an action on a promissory note—an instrument on which no one can sue unless he was originally a party to it, or has become entitled to it under one who was. A promissory note is not a personal chattel in possession, but is a *chose in action* of a peculiar nature. It has, indeed, been made, by statute, assignable and transferable according to the custom of merchants, like a bill of exchange. Still it is a chose in action, and nothing more. When a *chose in action*, such as a bond or note, is given to a feme covert, the [*224] husband may elect to let his wife *have the benefit of it;[1] or, if he thinks proper, he may take it himself; and if, in

[1] There is a familiar class of cases in equity in which the husband has suffered the wife, after marriage, to acquire a separate property of her own, as where, in Slanning v. Styles, 3 P. Wms. 338, a husband permitted his wife to make profit of all the butter, eggs and poultry, beyond what was used in the family, and borrowed of her £100, the fruit of these savings, she was held entitled to come in as a creditor, upon his estate, after his death; so, in Fettiplace v. Gorges, 1 Vesey, Jr. 46; Walter v. Hodges, 2 Swanston, 103; Rogers v. Fales, 5 Barr, 157.

In a very recent case in the Exchequer, Messenger v. Clarke, 5 Excheq. 388, a wife who lived apart from her husband, purchased stock in her maiden name, out of the allowance made to her by him, and having sold out this stock, and given the proceeds to her brother as a gift, the husband was held entitled to recover it from him after her death, the Court holding, that although her allowance was not subject to recall by the husband, yet that the stock when purchased, became his, and that she had no authority to dispose of it as a gift. It was said, however, that if it had been parted with for a valuable consideration, or the money been applied in payment of debt, it would have been otherwise. It is well settled with respect to the husband's right of disposition over his wife's choses in action, he cannot *give* them away (Burnett v. Kinnaston, 2 Vern. 401; Jewson v. Moulson, 2 Atkins, 417; Mitford v. Mitford, 9 Ves. 87; Johnson v. Johnson, 1 Jac. & Walker, 456; Hartman v. Dowdel, 1 Rawle, 281; Parsons v. Parsons, 9 New Hampshire, 322), whatever may be his power of barring her right of survivorship by an assignment or mortgage for a valuable consideration, or an application of them in discharge of a debt; see Ryland v. Smith, 1 Mylne & Craig, 53.

this case, the husband had, in his lifetime, brought an action upon this note in his own name, that would have amounted to an election to take it himself, and to an expression of dissent on his part, to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is: and, in that case, the remedy on it survives to the wife;[1] or he may adopt another course, and join her name with his own, and, in that case, if he should die after judgment, the wife would be entitled to the benefit of the note, as the judgment would survive to her."(a)

(a) Though it is settled law that a promissory note, given to the wife during coverture, is a chose in action, and not a personal chattel vested in the husband, and that upon his death the right to sue on it survives to the widow, unless the husband has reduced it into possession, it is still a point of nicety and difficulty to determine what is a reducing into possession by the husband, so as to deprive the wife of her subsequent remedy. In the recent case of Hart v. Stevens, 6 Queen's Bench, 937, it seems to have been assumed that receiving money on it, or bringing an action for it, are alone sufficient reductions into possession;[2] a doctrine apparently sanctioned by that of

[1] It has however been held in Massachusetts, that a note given or endorsed to a wife during coverture, is to be considered as actually reduced into possession, and at the husband's death would therefore go to his representative, to the exclusion of the wife's survivorship; Shuttleworth v. Noyes, 8 Mass. 229; Commonwealth v. Marley, 12 Pick. 173. He may, indeed, in such cases sue alone, and thus exercise his power of reducing it into possession, but until he does so, or receives the money without suit, it would seem that he cannot be considered as having at all interfered with it, so as to deprive her of her survivorship.

[2] This is not quite correctly stated. It was *contended* in Hart v. Stephens, that the receipt of interest on the note, was a reduction into possession, but the Court expressly said, "For this proposition *we think there is no foundation*;" see Nash v. Nash, 2 Maddock, 133. Milner v. Milner (infra), is no authority for the proposition that a receipt of interest will amount to a reduction into possession. That case decided that in an action of trespass, for injuries to the wife's property *before* coverture, the husband *must* join (see supra, note to p. 219). In Garforth v. Bradley, the distinction was pointed out between choses in action belonging to the wife *before* and *after* coverture —they equally remain with the wife, "with this distinction—that to

[*225] *Here you see all the possible cases are put, and the consequence of each pointed out, which

Lord Kenyon, C. J., in Milner v. Milner, 3 T. R. 631, and by Lord Hardwicke, in Garforth v. Bradley, 2 Ves., Sen. 675, who puts it on the ground of dissent to the interest remaining in the wife, thereby evidenced on the part of the husband. In the still later case of Scarpellini v. Atcheon, 7 Queen's Bench, 864, a case which presents some noticeable features, the plaintiff was a widow, and the payee of a promissory note made to her during coverture by the defendant. The husband caused the wife, as the plea stated, "in his marital right," to endorse to one Forbes, who after his death delivered it to the wife, who then brought this action upon it. The court held that the facts as stated, did not amount to a reduction into possession by the husband, and that "this at least is certain, that something precise and specific should be stated from which the court may reasonably infer that 'disagreement to the interest of the wife' mentioned by Lord Hardwicke, and an extinguishment of her rights." "Now the allegation that 'the husband elected to have and take the said note in his marital right,' must be considered rather the legal conclusion from the facts stated, than as an averment sufficient in itself. But supposing the endorsement in the plaintiff's name by the husband's authority to be equivalent to the husband's endorsement, what does the statement of the delivery by him to Forbes necessarily import? Are we to infer, in the absence of any statement to that effect, that it was delivered for a valuable consideration at the time given, or to satisfy a debt before due from the husband to Forbes? or, in short, that it implies a dealing adverse to the wishes, and inconsistent with the rights of the wife! We think that this ought not to have been left to uncertainty, and that the plea which vests this point of reduction into possession by the husband is defective."

As to what amounts to a reduction into possession, see further instances in Burnham v. Bennett, 9 Jur. 888, and Hart v. Stevens, above cited, where the administrator of a deceased widow sued on a note given her *dum sola;* it was held that the husband of the deceased, by receiving interest on the note during the life of the wife had not reduced it into possession; and accordingly, that he was a competent

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those which come during the coverture, the husband may for them bring the action in his own name, may disagree to the interest of the wife, and that recovery in his own name is equal to reducing into possession."

makes this judgment a very useful one for the purpose of practical reference.

Having thus disposed of the considerations arising on contracts made with or by infants and married women,[1] I will postpone the conclusion of this branch of the subject till the next lecture.

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*LECTURE IX. [*226]

PARTIES TO CONTRACTS—INSANE PERSONS—INTOXICATED PERSONS—ALIENS—CORPORATIONS—THE MODE IN WHICH COMPETENT PERSONS CONTRACT—AGENTS—PARTNERS—PUBLIC COMPANIES.

PURSUING the inquiry upon which I entered in the last lecture with regard to the competency of the parties to Contracts, and having disposed of the cases of *Infancy* and *Coverture*, the next in order is that of persons of *non-sane* mind, whose disability arises, not, as in the two former cases, from a positive rule of *law*, but from the very nature of their disorder itself.

In the earliest ages of our law the rule which common sense dictates on this subject appears to have

witness for the plaintiff by stat. 6 & 7 Vict. c. 85, notwithstanding any ultimate interests in the assets, and that receipts of interest by him were available to take the case out of the Statute of Limitations.

[1] The interesting questions which arise as to the wife's equity to a settlement, as it is termed, and as to her power of disposition over her separate estate, are not strictly pertinent to the subject of this book. The cases as to the former of these subjects, may be found collected in the note to Murray v. Lord Elibank, 1 White's Eq. Cases, 319, and as to the latter in that to Hulme v. Tenant, Id. 355.

prevailed, namely, that a person deprived of the use of that reason which is the *instrument*, if I may so say, with which men contract, shall not be bound to his own injury by contracts made while in such a situation. Thus in Fitzherbert's Natura Brevium, 202 n. it is laid down that a person who had enfeoffed another of his land while *non compos* might, on recovering his intellects, avoid the feoffment. But, soon afterwards, a doctrine was established of the most absurd description which it was possible *for the ingenuity even [*227] of an ancient lawyer to have devised. It was admitted that the acts and contracts of a lunatic could not be looked upon as valid so far as they affected other persons, but it was said that they should bind the lunatic himself, after he had recovered the use of his reason; "for," said the old lawyers, "a man cannot remember what he did when he was out of his mind, and consequently cannot recollect whether he did this or that particular act, or entered into this or that particular contract." And they actually carried this so far that it became a maxim that a *man should not be heard to stultify himself*, and it is laid down as such in the 405th and 406th sections of Littleton, and in Stroud v. Marshall, Cro. Eliz. 398, where the opinion of Fitzherbert to the contrary, in his Natura Brevium, was overruled.

However, in more modern times, the common sense of the courts began to be shocked by this doctrine, and Sir William Blackstone, in his commentaries, book ii. p. 291, argues with great force of reasoning against it. And in the later cases of Yates v. Boen, Str. 1104, and Faulder v. Silk, 3 Camp. 126, it seems to have been discarded; so that I think we are now justified in saying that it has virtually ceased to exist, and that the lunacy of one of the contracting parties may be

shown by himself if sued upon a contract entered into while he was in that situation.[1] However, it would not be for the lunatic's own *benefit to prohibit him *absolutely* from binding himself by any [*228] contract whatever. Such a prohibition might prevent him from obtaining credit for the ordinary necessaries of life; and there are many modern cases in which contracts evidently of a fair and reasonable description entered into with a lunatic have been held binding on him, and have been enforced. In the case of Baxter v. Earl of Portsmouth, 5 B. & C. 170, 11 E. C. L. R., an action was brought against the Earl of Portsmouth for the hire of several carriages. It was proved that the carriages were suitable to his rank and fortune, and that the price charged for them was a fair and reasonable one, but on the other hand it appeared that an inquisition had issued out of Chancery under which the Earl was found to have been insane from a period long anterior to the time at which the carriages in question were supplied to him. The L. C. J. Abbott, before whom the case was tried, directed the jury that, as the articles hired were suitable to the station and fortune of the defendant, and as the plaintiffs, at the time of making the contract, had no reason to suppose him of unsound mind, and could not be charged with practising any imposition upon him, they were entitled to recover, and the jury accordingly found a verdict for the plaintiffs. Mr. (now Lord) Brougham moved in the next term to set it aside, but the Court supported the direction of the Lord Chief Justice.

*In a subsequent case of Brown v. Joddrell, [*229] M. & M. 105,[2] the lunatic was the chairman of

[1] Mitchell v. Kingman, 5 Pick. 431; Rice v. Peet, 15 Johns. 503; Grant v. Thompson, 4 Connect. 203, 1 Story's Eq. Jur. § 225.

[2] Also reported 3 Carr & Payne, 30, 14 E. C. L. R. Lord Ten-

a society called the Athenaion, and he had concurred in ordering work and goods to be supplied to them; for these Lord Tenterden held that he might be sued by the person who had supplied them. (See also Dane v. Kirkwall, 8 Car. & Payne, 679, 34 E. C. L. R.[1]) From these decisions it is plain that a lunatic's contracts are binding in many instances; and some treatises suggest that he stands on the same footing with an infant, and is liable only for necessaries. But this is, I think, not quite so; nor would it be reasonable that it should be so; for, where a lunatic is permitted to go about and appear to the world as a person of sane mind, it would be very hard indeed to prevent persons who had supplied him with goods under that impression at a fair price, from recovering because the articles were not necessaries. And in the case I have just cited, of Brown v. Joddrell, an infant could not, I think, have been held liable for goods supplied to the Athenaion. One of the latest cases in which the subject has been canvassed, is that of Tarbuck v. Bispham, 2 Mee. & Welsb. p. 2, in which one of the questions was whether a lunatic laboured under the same incapacity to bind himself by stating an account as I have already shown you that an infant does. The case went off upon a

terden there seemed, however, to rely on the old common law doctrine, and on the ground that a man should not be suffered to stultify himself, refused to admit evidence of the insanity, unless it could be proved that the defendant had been imposed upon, by reason of his mental incapacity. But see the later cases, infra.

[1] That was an action for use and occupation of a house, and it was shown on behalf of the defendant that she was of unsound mind, that she had no occasion for the house, and that the rent was exorbitant, and it was left to the jury to say whether the plaintiff knew of the defendant's insanity, and took advantage of it. It was not sufficient that the defendant was insane, without these additional circumstances.

different point, but the Court said that, had it *become material they would have granted a rule for the purpose of considering it. [*230]

There is another late case, argued some time ago in the Court of Queen's Bench, and in which the learning on this subject was very fully canvassed. I am not aware whether the decision of the Court has yet been pronounced; but I mention it, in order that, if you should have occasion to consider any point connected with this subject, you may be aware that there has been this very recent case, and may make due inquiry.(a)

Upon the whole, this branch of the law is, even now, in a very unsettled state. Some parts, indeed, seem clear. It seems clear that a lunatic is liable upon an executed contract for articles suitable to his degree, furnished by a person who did not know of his lunacy, and practised no *imposition upon him.[1] [*231] It seems equally clear that he is not liable when the other contracting party has taken advantage of

(a) The case here referred to is probably that of Clark and Another v. Medcalf and others, argued in the Court of Queen's Bench in Hilary Term, 1841, and in which the judgment was given in the following Trinity Term, but is not reported. It, however, threw no new light whatever on the subject, and was decided in favour of the plaintiffs, who were London agents of the defendants, who were country attorneys; the action was for work done and money paid as such agents, and on an account stated. One of the defendants pleaded insanity. But as there had been an executed contract, and for legitimate consideration, without notice of insanity, or any pretence of fraud by the plaintiffs, the Court adjudged for the plaintiffs, without entering into the question raised by the count on the account stated.

[1] In the recent case of Moulton v. Camroux, 2 Exchequer, 501, which was an action to recover money paid by a lunatic for the purchase of an annuity, the jury found that the transaction was a fair

his lunacy. Indeed that was the decision in Levy v. Baker, reported in a note to Brown v. Joddrell. But

and business one, and made by the defendants in good faith, and in ignorance of the plaintiff's unsoundness, and the Court in giving judgment for the defendant, thus reviewed the cases:

"The plaintiff's counsel distinguished the cases of Browne v. Joddrell, 1 Mood. & M. 105, and Baxter v. The Earl of Portsmouth, 2 C. & P. 178, 5 B. & C. 170, and other cases of that sort, on the ground that necessaries furnished to a lunatic were an exception to the general doctrine that he could not make a contract; and he cited the judgment of the Lord Chief Baron, in the case of Gore v. Gibson, as showing a distinction between express and implied contracts, and deciding that all express contracts were void, if the parties to them were incapable of making a contract. On the other hand, it was argued by the defendant's counsel, that there was a distinction between contracts executed and executory; that executory contracts could not be enforced, but that executed contracts could not be disturbed, if made in good faith and without notice of the incapacity; and he called our attention to this, that all the cases cited were cases where damages for the breach of an executory contract were in question, but that no case had yet decided, that an executed contract, if perfectly fair and *bona fide*, could be questioned on the ground of the unsoundness of mind of both parties; and he cited the cases of Howard v. The Earl of Digby, 2 Cl. & Fin. 634; Williams v. Wentworth, 5 Beav. 325; and Selby v. Jackson, 6 Beav. 192, to show that the House of Lords in the first case, and Lord Langdale in the two last, had recognised the liability of lunatics or their estate, in respect of contracts *bona fide* acted upon. The case of Neill v. Morley, 9 Ves. 478; before Sir William Grant, to the same effect, had been cited before, by the counsel for the plaintiff.

"As far as we are aware, this is the first case in which it has been broadly contended that the executed contracts of a lunatic must be dealt with as absolutely void, however entered into, and although perfectly fair, *bona fide*, reasonable, and without notice, on the part of those who have dealt with the lunatic.

"On looking into the cases at law, we find that, in Browne v. Joddrell, Lord Tenterden says, 'I think the defence (of unsoundness of mind) will not avail, unless it be shown that the plaintiff imposed on the defendant.' In Baxter v. the Earl of Portsmouth, 5 B. & C. 170 (the Nisi Prius authority of which is in 2 C. & P. 178), Abbott,

it appears to me to be still uncertain whether he be liable upon an executed contract to a person who

C. J., with the concurrence of the rest of the Court, laid down the same doctrine. In Dane v. Viscountess Kirkwall, Mr. Justice Patterson, in directing the jury, said, 'It is not sufficient that Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it, and took advantage of it.'

"We are not disposed to lay down so general a proposition, as that all executed contracts *bona fide* entered into must be taken as valid, though one of the parties be of unsound mind; we think, however, that we may safely conclude, that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bona fide*, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in *statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him. And this is the present case, for it is the purchase of an annuity which has ceased." This judgment was subsequently affirmed on error in the Exchequer Chamber; 4 Excheq. 18.

The same principle was adopted in Pennsylvania, in Beals v. Lee, 10 Barr, 60 (following La Rue v. Gilkyson, 4 Id. 375), where it was held that the administrator of a lunatic could not, in the absence of fraud or knowledge of his state of mind, or such conduct on the part of the lunatic from which his disease might fairly be inferred or suspected, recover back the price of merchandise sold to him, even though it was unsuited to the object for which it was purchased, and above the market price.

In Massachusetts, however, in the case of Seaver v. Phelps, 11 Pick. 304, which was trover for a promissory note, pledged by the plaintiff while insane, to the defendant, the Court were, on behalf of the latter, requested to charge, that although the plaintiff might have been insane at the time of making the contract, yet that if the defendant were not apprised of that fact, or had no reason, from the conduct of the plaintiff or from any other source, to suspect it, and did not overreach or impose upon him, or practice any fraud or unfairness, the contract could not be annulled; but the Court refused so to charge, and the jury having found for the plaintiff, the Supreme Court affirmed the judgment, on the authority of Thompson v. Leach, 3 Mod. 310, and regarded the law on the subject of contracts made

knew of his lunacy, but did not take advantage of it, or upon any executed contract at all. If I were to conjecture, I should be disposed to think that in the former case he would be liable for necessaries,(*a*) and in the latter case not liable at all.[1] But these are

(*a*) The Courts of Chancery uphold the liability of a lunatic for necessaries, and on his decease such debts are payable out of his real or personal assets. (Wentworth v. Tubb, 1 Young & Col. N. C. 171.)

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by lunatics, as being on the same footing as those of an infant; and it was said that the case of Baxter v. The Earl of Portsmouth, supra, was, notwithstanding the dicta in the case, decided mainly on the ground of the carriages being suitable to the defendant's condition in life, and the opinion of Lord Tenterden, in Brown v. Joddrell, supra, as to the materiality of the absence of imposition, was disapproved. It may be remarked, however, that Thompson v. Leach is not an authority for such a point, further than that "the *grants* of infants, and of persons *non compos mentis*, are parallel both in law and reason," and this is a well-settled rule of the law of *real* estate, the grants of both being voidable; F. N. B., 202 n, Mitchell v. Kingman, 5 Pick. 431; Allis v. Billings, 6 Metcalf, 419 (see the termination of the case in 2 Cush. 19, by which it appears that the party was, at times at least, only feigning insanity); Fitzgerald v. Reed, 9 Smedes & Marsh. (Miss.) 102. The recent case of Hallett v. Oakes, 1 Cushing, 296, was an action to recover the value of professional services in a *habeas corpus* to procure the liberation of one who was insane and remanded as such, and a recovery was allowed on the ground of such services being classed with necessaries, and having been rendered by the plaintiff in good faith, and on due inquiry into the grounds and causes of the confinement.

[1] Such was the distinction noticed in La Rue v. Gilkyson, 4 Barr, 375, where the executor of a lunatic was held liable for board, washing, &c., of the testator while insane. "But," said the Court, "to supply him with articles known to be improper for him, would bear upon the face of the transaction evidence of an attempt to take advantage of his infirmity, and he would not be liable for the price of them. Nor would he be liable on a contract unexecuted by either party."

merely my conjectures, and I request that you will attach no weight whatever to them.(a)

*As the law regarding the contracts of lunatics has experienced some alteration, so also has the law regarding contracts entered into by the class of persons whom I shall next specify,—I mean persons deprived of the use of their ordinary understanding by intoxication. It has been always admitted, that, if one man by contrivance and stratagem reduced another to a state of inebriety, and induced him, while in that state, to enter into a contract, it would be void upon [*232]

(a) It remains to be seen, nevertheless, whether Mr. Smith's conjecture may not have considerable weight attached to it in deciding the law on a point which is still, we believe, in the same state of uncertainty as when he wrote this lecture in 1841.

As regards bills of exchange and all specialties, lunacy appears to have been held a good defence, whether there has been a knowledge of the insanity or not; but Lord Tenterden, C. J., seems to have qualified this doctrine in the case of Sentance v. Poole, 3 Carr. & Payne, 1, 14 E. C. L. R. It was an action by an innocent endorsee to which insanity was pleaded, and the learned judge laid it down to the jury that they "should be satisfied that he (the defendant) was not conscious of what he was doing, and that he was imposed upon by reason of his imbecility of mind." This limits the defence, and brings it very nearly within the requirements of a plea of fraud. The case of Alcock v. Alcock, 3 M. & Gr. 268, 42 E. C. L. R., where the maker of a promissory note was allowed to plead the insanity of the endorser at the time he endorsed, decides nothing more than that the Court will grant leave to a defendant to amend his pleas by adding that of insanity to the record, the fact of the endorser's lunacy having come to the defendant's knowledge after issue joined. It does not at all follow that the judges would have held otherwise than as Ld. Tenterden held in Sentance v. Poole; the question there put, might have been left to the jury in the case of Alcock v. Alcock. The exact limit of this defence is undefined; and it would be presumptuous and useless to attempt to carry it further than Mr. Smith has done in the absence of more decisive authority.

the ordinary ground of fraud; for the liquor would be in such case an instrument used by the one party to assist him in his plot against the other. (See Gregory v. Frazer, 3 Camp. 454; Brandon v. Old, 3 C. & P. 440, 14 E. C. L. R.)[1] But it has been supposed that, [*233] where the drunkenness of the *contracting party was not occasioned by the fraud of the contractee, but by his own folly, he could not in such a case set it up as a defence; since, by doing so, he would have taken advantage of his own wrong. You will see this view taken in Coke Litt. 247, a, and even so late as Cory v. Cory, 1 Ves. 19. There are, however, several late cases, in which it seems to have been treated as erroneous. In Pitt v. Smith, 3 Camp. 33, issue had been joined upon the question whether there was an agreement between the plaintiff and defendant for the sale of an estate. It turned out that there was an *agreement* signed, in fact, but that one of the parties when he signed it was intoxicated; Lord Ellenborough said:—

"There was no agreement between the parties, if the defendant was intoxicated, in the manner supposed when he signed this paper. He had not *an agreeing mind.* Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, of *non assumpsit* to a promise;"(a)

And he directed a nonsuit, which the full court afterwards refused to set aside. In Fenton v. Holloway, 1 Stark. 126, 2 E. C. L. R., Lord Ellenborough again

(a) Under the new rules of pleading it must of course be specially pleaded.

[1] Hotchkiss v. Fortson, 7 Yerger, 67; Harvey v. Pecks, 1 Munford, 518.

ruled in the same manner; and see Sentance v. Poole, 3 C. & P. 1; Cooke v. Clayworth, 18 Vesey, 15.(a)[1]

(a) Intoxication avoids a contract when it is so complete as to prevent a man from knowing what he is about: in that state he is, in common parlance, "not himself," nor are his acts his own. "It is just the same," said Mr. Baron Alderson (in Gore v. Gibson, 13 M. & W. 623, an action on a bill by endorsee against endorser, who

[1] In Gore v. Gibson, 13 Mees. & Wels. 625, Pollock, C. B., referred to the conclusion drawn from the authorities by Chancellor Kent, in his Commentaries (vol. ii. p. 451), viz.: that no contract made by a person in that state, when he does not know the consequences of his acts, is binding upon him; and added, that it seemed to be in accordance with reason and justice. It is immaterial, moreover, whether the drunkenness, if carried to that extent, were voluntary, or the result of design on the other party; Barratt v. Buxton, 2 Aiken, 167; Wiggleworth v. Steers, 2 Hen. & Munf. 70; Prentice v. Achorn, 2 Paige, 30; Rooke v. Clayworth, 18 Vesey, 15. And on the other hand, it is equally well settled, that mere intoxication, unless carried so far as to benumb the understanding, will not *of itself* constitute a defence to the performance of a contract, or afford a ground for its recission if executed; Belcher v. Belcher, 10 Yerger, 121; Pittinger v. Pittinger, 2 Green's Ch. 156; Ford v. Hitchcock, 8 Ohio, 214; Jenners v. Howard, 6 Blackford, 240. Whether the intoxication was so complete as to destroy "the agreeing mind," is, of course, a question for the jury; Burroughs v. Richmond 1 Green (Law), R. 238. If, however, it were proved that advantage was taken of a person excited by drink, though not to such an extent as to impair all his reasoning faculties, it is apprehended that at law the case might be brought within the ground of fraud, although the contracting party might not have been directly incited to drink by the other, and it is well settled that equity will afford relief under such circumstances; Reynolds v. Wall, 1 Washington, 164; Crane v. Conklin, Saxton (N. S.), 346; Hutchinson v. Tindell, 2 Green's Ch. 357; Pittinger v. Pittinger, Id. 156; Conant v. Jackson, 16 Vermont, 335; Campbell v. Spencer, 2 Binney, 133; and so when the mind is enfeebled by habitual intoxication; Wilson v. Bigger, 7 Watts & Serg. 124; Morrison v. M'Cord, 2 Dev. & Batt. Eq. 221. It is evident, however, that although one may, by reason of drunkenness, be incapable of contracting, yet his contract may be ratified by his retaining the subject of the contract when sober; Gore v. Gibson, supra.

[*234] *I have now to direct your attention to aliens. And we again subdivide this class into two

pleaded drunkenness); "It is just the same as if the defendant had written his name upon the bill in his sleep, in a state of somnambulism." In that case the law was thus explained by the learned judges:

1. As regards the state of the drunken man where, said Mr. Baron Parke, he enters into the contract in "such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether. A person who takes an obligation from another under such circumstances is guilty of actual fraud." It can scarcely be that the other party can be ignorant of the complete drunkenness of the person he contracts with personally. But many cases might arise where the party suing was neither present nor cognizant of the state in which the defendant signed or authorized the contract. It seems that the question would there arise as to the consideration.

2. If the consideration were for necessaries, Mr. Baron Alderson said that a party, "even in a state of complete drunkenness, may be liable, in cases where the contract is necessary for his preservation, as in the case of a supply of actual necessaries; so also where he keeps the goods when he is sober; although I much doubt whether, if he repudiated the contract when sober, any action could be maintained on it." The Lord Chief Baron also said, "So a tradesman who supplies a drunken man with necessaries may recover the price of them, if the party keeps them when he becomes sober; although a count for goods bargained and sold would fail." The distinction is thus well shown. To support a count of goods sold and delivered, proof of acceptance as well as delivery is requisite, and if there had been acceptance, the plea of drunkenness would not avail; the keeping of the goods would be proof of acceptance, and the sober assent thus evidenced would ratify the drunken contract. But into the support of a count for goods bargained and sold, delivery does not enter as long as the contract was complete at the time, and the plea of intoxication, if sustained, would be a complete defence, for there could have been no acceptance to waive it. Thus the defence of complete drunkenness at the time of a contract, can be waived only by a subsequent assent to the contract: as in the case of all executed contracts, of which the drunken man has availed himself; in such case, and in such only, it seems that he would stultify himself by pleading his drunkenness. If this be a sound conclusion from the

minor ones—of alien friends, and alien enemies. With regard to *alien friends*, *they have a right to contract with the subjects of this country, and [*235] may sue on such contracts in the courts of this country, Bac. Abr. Aliens, D., whether the contract was made in England or abroad, with this distinction, that if it was made in England, it is expounded according to the law of England;[1] if abroad, according to the law of the country where it was made: but whether it was made abroad or in England, the person who sues on it here must take the remedy here as he finds it, although, perhaps, abroad there might have *been a more advantageous one. Thus, for instance, [*236] according to the law of England, if a bill of exchange be payable to A. or order, A.'s endorsement in blank, that is, his simply writing his name on the back, is suf-

doctrine laid down by the judges, it is submitted that the knowledge of the plaintiff of the drunkenness at the time, is immaterial as to the liability or non-liability of the drunken party to the contract, which does not depend upon the fraud or innocence of the plaintiff, but on the mental incompetence of the defendant. It is obvious that to render it necessary to prove not only that the contractor was drunk, but also that the party suing knew it, would open a door to easy resources for the purpose of effectually preventing any such proof being given on the part of the sufferer.

[1] Provided the subject of the contract be personal property. But it is well settled on this side of the Atlantic that any interest or title to real estate can only be acquired or transferred according to the *lex loci rei sitæ*, and not according to the *lex loci contractus;* Cutter v. Davenport, 1 Pick. 81; Horsford v. Nichols, 1 Paige, 220; Chapman v. Robertson, 6 Paige, 630; Wills v. Cowper, 2 Ham. 124. Such, too, *seems* to be the law in England; Robinson v. Bland, 1 W. Black. 246, S. C. 2 Burr. 1079; Scott v. Allworthy, 2 Dow & Clarke, 412, Fergusson on Mar. & Div. 395; Curts v. Hutton, 14 Ves. 541; Birtwhistle v. Vardill, 5 B. & Cress. 438, S. C. 9 Bligh, 32. Some of the foreign jurists, however, do not recognise this distinction between movables and immovables. See Story's Conflict of Laws, § 52, &c.

ficient to transfer the property in it to any one to whom he may think fit to hand it; whereas, according to the law of France, a special endorsement, that is, an endorsement naming the transferee, is necessary for the same purpose. Now if an action be brought in the Queen's Bench here by the endorsee of an English bill, he will recover on showing an endorsement in blank, whereas, if the action were brought by the endorsee of a French bill, he will be obliged to show a special endorsement. And the reason of this is, that the law of the country where a contract is made, being by implication incorporated into the contract, it is considered to be part of the contract arising on such a bill made in England, that it shall be transferable by an endorsement in blank, and part of the contract arising on a French bill that it shall be transferable only by a special endorsement; see Trimby v. Vignier, 1 Bing. N. C. 151, 27 E. C. L. R. Again, to an action on a bill of exchange, the French period of limitation is *five* years, ours is *six;* now if an action be brought here on a French bill, the courts here will not adopt the French period of limitation, but our own, and so the payee may recover here at any time within six years, though in [*237] France, where *the bill was made, he must have brought his action within *five;* the reason for which is that the period of limitation within which a remedy is to be pursued is part and parcel of the remedy itself, and, though a *contract* is interpreted by the law of the country where it is made, the *remedy* must be pursued as it exists in the country where the suit is brought.

I have rather digressed for the purpose of pointing out these two rules to you. They are two of the most celebrated principles of our law, and there is scarcely any question arising on a foreign contract which they

will not solve. You will see them carried out and explained in British Linen Company v. Drummond, 10 B. & C. 903, 21 E. C. L. R.; De la Vega v. Vianna, 1 B. & Ad. 284, 20 E. C. L. R.[1]

So far with regard to contracts made with alien friends; now with regard to *alien enemies*, i. e. aliens whose governments are at war with this country. All contracts made with them are wholly void;[2] Brandon v. Nesbitt, 6 T. R. 23; Willison v. Pattison, 7 Taunt. 439; in which latter case it was decided, that, if the contract was made during war time, it does not become capable of being enforced even on the return of peace. Although if a contract be made with an alien friend, and a war afterwards breaks out between his country and this, the effect is to suspend his right to sue upon the contract until the return of peace, not wholly to disqualify *him from so doing. (Flindt v. Waters, 15 East. 260.) (a) [*238]

(a) "The Alien Act, 7 & 8 Vict. c. 66, s. 16, enacts that any woman married or who shall be married to a natural-born subject or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject;" and section 3 renders all children born of a natural-born subject of

[1] The student will find all the law upon this interesting subject collected in the 8th and 14th Chapters of Story's Conflict of Laws.

[2] There is an exception to this rule which naturally springs from it, which is, that contracts made with an alien enemy for the payment of ransom money or for subsistence, can be enforced. Thus, in Antoine v. Morehead, 6 Taunton, 237, 1 E. C. L. R., an alien to whom was endorsed a bill of exchange, drawn by one English subject, detained a prisoner in France, upon another subject, was held entitled to recover its amount in England after the return of peace.

In the well-known case of Griswold v. Waddington, 15 Johnson, 57, in error, 16 Id. 438–510, the whole law upon the subject of contracts with alien enemies was elaborately examined in an able opinion by Mr. Chancellor Kent.

Another class of persons who are disabled from enforcing contracts are outlaws and persons under sentence for felony; see Bullock v. Dobbs, 2 B. & A. 250. They are, however, liable upon the contracts made by them while in that situation, though incapable of taking advantage of them; Macdonald v. Ramsey, Foster, C. L. 61.

There is one other class, I was about to say of individuals, but that would have been incorrect (for, although *persons* in the eye of the law, they are not [*239] individuals in common parlance), *regarding whose power of contracting I have a few words to say,—I mean *corporations aggregate.* A corporation aggregate consists, as you know, of a number of individuals united in such a manner that they and their successors constitute but one person in law. Thus, the mayor, aldermen, and burgesses of a borough are a corporation, and as such, have an existence distinct from that of the individual mayor and of the individuals enjoying the franchise of burgess, or post of alderman. But then, this corporate existence being an ideal one, and the creature of the law, it is obviously impossible that the corporation can contract in the

the United Kingdom capable of taking to him, his heirs, &c., any estate by devise, purchase, or inheritance of succession. These enactments, together with those which preceded them, make all children born of parents, either of whom is British or Irish, natural subjects, and thus relate equally to those born before and after the act of 7 & 8 Vict. c. 66, which also gives additional privileges to alien friends for the tenure of hereditaments, chattels real, as well as personal property, with the same rights and remedies as natural-born subjects. According to the previous provisions it seems that if the mother has married an alien enemy, her children, though the sons of an alien enemy, will still be entitled to all the rights and remedies of natural subjects, and that all contracts made by them can be enforced in our Courts.

same way as an ordinary person. Accordingly the law, the creature of which, as I have said it is, has provided for it a mode of contracting, namely, by its common seal, which, being affixed to the contract, authenticates it and makes it the deed of the corporation; and, as a general rule, that is the only way in which a corporation can contract; see Charlton v. Mayor, Aldermen, and Burgesses of Ludlow, 6 M. & W. 815.[1] But to this rule, as to most other general rules, necessity and the convenience of the world has occasioned some exceptions; the principal of which is that where an act of Parliament has created a corporation for mercantile purposes, it is allowed to enter without seal into certain contracts which are usually entered into without seal by commercial men; for instance, *bills of exchange (see Church v. Imperial Gas Light Company, 6 Ad. & Ell. 846, 33 E. C. L. R., and R. v. Bigg, 3 P. Wms. 419). And there are some acts of trifling importance which every corporation may do without deed, and of which you will see an enumeration in Comyn's Digest, Franchises, F. 13, and the judgment of the Chief Justice of the Common Pleas in East London Waterworks Company v. Bailey, 4 Bingh. 283, 13 E. C. L. R. These exceptions seem, however, to depend on no settled principle; and the only safe general rule to rely upon in practice is, that a corporation can contract only by deed under its common seal, unless there be some express authority in favour of its being allowed to make the particular contract in question without seal, or unless there be some act of Parliament conferring on it powers different from those possessed by corporations in general.[2] (See, for cases in which the power of a [*240]

[1] See note on next page.

[2] The excepted cases referred to in the decision in The East Lon-

corporation to act without deed has been discussed, Broughton v. Manchester and Salford Waterworks Company, 3 B. & A. 1, 23 E. C. L. R.; Smith v. Birmingham Gas Light Company, 1 A. & E. 526, 28 E.

don Waterworks Co. v. Bailey, supra, were, 1, where the contract is executed; 2, where the acts done are of daily necessity, and too insignificant for the trouble of the seal; 3, where the corporation has a head, as a mayor or a dean, who may give commands; 4, where the act should from necessity be done immediately; and 5, where it is essential to a monied corporation, like the Bank of England, that it should have the power of issuing bills and notes. But the distinction between executed and executory contracts, which was the foundation of the first of those exceptions, was directly overruled in Church v. The Imperial Gas Co., 6 Ad. & Ell. 846, 33 E. C. L. R. That case, which decided that a corporation might maintain assumpsit for breach of an unsealed contract to accept gas from year to year at so much per annum, was rested on the second and fifth of the above exceptions, the contract being one of daily occurrence, and almost essential ("convenience amounting almost to necessity"), for the purposes of the corporation; and all the recent cases in England have been decided upon the same grounds; Beverley v. The Lincoln's Inn Gas Light and Coke Co., 6 Ad. & Ell. 829, 33 E. C. L. R.; Paine v. Strand Union, 8 Queen's Bench, 326, 55 E. C. L. R.; Mayor of Ludlow v. Charlton, 6 Mees. & Wels. 824; Lamprell v. The Billericay Union, 3 Exchequer, 306; Diggle v. London and Blackwall Railway Co., 5 Id. 442; Finlay v. Bristol and Exeter Railway Co., 9 Eng. Law & Eq. R. 483.

On this side of the Atlantic, however, a much more relaxed rule prevails, and it has long been settled that there is no distinction between the contracts of a corporation and a natural person, whether they are express or implied, either from acceptance of an executed consideration or from the ratification of acts done on its behalf by its members or others; Bank U. S. v. Dandridge, 12 Wheaton, 64; Proprietors v. Gordon, 1 Pick. 297; Ross v. City of Madison, 1 Smith (Ind.), 98; Gasset v. Andover, 21 Vermont, 102; and see many other cases collected in Angell and Ames on Corporations, 211, 212; 2 Kent's Com. 290 (whose statement of the law is referred to by Patteson, J., in Beverley v. Gas Co., supra), and the note to Mayor v. Charlton, 6 Mees. & Wels. 824, Am. Ed.

C. L. R.; Beverley v. Lincoln's Inn Gas Light Company, 6 A. & E. 844, 33 E. C. L. R.)(*a*)

*I have now specified the various classes of parties with regard to whose competency to enter into contracts, I had any particular observations to make, and now, assuming that none of the various cases of disability which I have mentioned arises, but that the parties entering into a contract are competent by law to do so, there remains one other very important subject to advert to, namely, the mode in which they [*241]

(*a*) The settled rule is, that for trivial matters frequently occurring, and essential to the business of the corporation, and such as do not admit of delay, actions of simple contract may be maintained, and the plaintiffs not required to show an engagement under the common seal. (Hull v. Mayor of Swansea, 5 Q. B. 526, 48 E. C. L. R.) But all important matters, neither of frequent occurrence nor of immediate urgency, such, for instance, as the appointment of an attorney to conduct important suits, must be contracted for under the seal of the corporation. (Arnold v. The Mayor of Poole, 4 M. & Gr. 860, 43 E. C. L. R.) But where a contract without seal, and yet not falling under any of the exceptions, has been performed on the part of the corporation, and the other party has benefitted by that performance, such contract ceases to be *nudum pactum*, and the corporation may enforce it in an action of *assumpsit*. (Fishmongers' Company v. Robertson, 5 M. & Gr. 131, 46 E. C. L. R.) The principle of this recent decision is, that the defendants, having received the full amount of the consideration, which was voluntarily performed by the plaintiffs, can have no need to sue on the contract themselves, though, as long as the contract remained wholly executory, neither could the company have sued on one which they could not have been compelled to perform, but which having performed on their part, they had a reasonable right to enforce against those who had reaped the benefit of their integrity.

A distinction was once taken between the power of corporations to sue on executed and executory contracts, which the case of Church v. The Imperial Gas Light Company, above cited, overruled.

The case of the Fishmongers' Company v. Robertson, shows that contracts of corporations not under seal are *voidable*, but not *void*. (See note on Contracts by "Public Companies," post, p. 257.)

[*242] may *become parties to the contract. And this must be in one of two ways: either personally or by the intervention of an agent.

There are few branches, perhaps no branch of the law of England, to which it becomes so often necessary to refer as that which regulates the rights of parties under contracts made by agents. The truth is, that as society is now constituted, the business of life has become so complicated that "no man's individual efforts can embrace all the subjects with which he is called on to deal." Hence we are obliged to transact a variety of business and enter into a variety of engagements through the medium of agents, the precise effect of whose acts in binding or advantaging us becomes of course a matter of the utmost practical importance. I cannot, however, attempt, in the time which remains to me for that purpose, to do more than state the general principles by which the subject (so far as relates to contracts) is regulated.

Generally speaking, whatever contract a man may enter into, in his own person, he may, if he think fit, appoint an agent to enter into in his behalf. There are, indeed, one or two exceptions to this rule, which arise out of the wording of certain acts of Parliament, requiring the intervention of the principal party himself in certain contracts. For instance, a man cannot appoint an agent to sign a writing for the purpose of [*243] exempting a case from the operation of *the Statute of Limitations; Hyde v. Johnson, 2 Bing. N. C. 777, 29 E. C. L. R.

But, generally speaking, whatever contract a man may lawfully enter into himself, he may appoint an agent to enter into for him. Now the considerations on which I shall have occasion to touch relate *to one* of *four points* into which what I have to say on the sub-

ject may be conveniently enough distributed; and they relate to the questions:—

1. *Who may be an agent.*
2. *How an agent is appointed.*
3. *How far his contracts bind his principal.*
4. *How far the principal may be advantaged by them.*

Now with regard to the *first* point, namely, *who* is competent to be an agent, I have to observe, that it by no means follows that a person who is not competent to contract himself, is therefore not competent to contract as agent for another person; thus, it has been decided that an infant may be an agent, or even a married woman, though she could not have contracted in her own right; Pretwick v. Marshall, 7 Bing. 565, 20 E. C. L. R.; Prince v. Brunatte, 1 Bing. N. C. 438, 27 E. C. L. R.[1] But it is held that, upon the peculiar wording of the Statute of Frauds, one of two parties entering into a contract, such as we have seen that that act requires should be in writing, cannot be agent for the other, even with the other's consent, so as to bind him by his signature to such a *writing.[2] See Wright v. Dannah, 2 Camp. 203; [*244] Farebrother v. Simmons, 5 B. & Ald. 333, 7 E. C. L. R.

With regard to the second point, namely, in what manner an agent is to be appointed. Whenever there is no particular rule of law or special statutory provision pointing out a particular mode of appointment, he may be appointed even by bare words. But there are some cases in which the common or statute law *does* require a particular mode of appointment; for instance,

[1] Hopkins v. Mollineux, 4 Wend. 465.

[2] That is to say, the agent must be a third person. See also Bird v. Boulter, 4 Barn. & Adolph. 443, 24 E. C. L. R.

it is a rule of the common law that an agent who is to contract for his principal by deed, must himself be appointed by deed; Harrison v. Jackson, 7 T. R. 209.[1]

Again, a corporation, as it can, generally speaking, do no act except by deed; so it cannot, generally speaking, appoint an agent in any other way. There are, indeed, one or two exceptions to this, as to the rule which obliges them to contract by deed, particularly in the case of trading companies; but, as I have already said, the general rule is certain, but it is impossible to reduce the exceptions to any very clear principle.[2] You will find the rule and the exceptions discussed in Dunston v. Imperial Gas Light Company, 3 B. & Ad. 125, 23 E. C. L. R. With regard to the case of a statute requiring a particular mode of appointment, you may take, for example, the Statute of Frauds, the 1st, 2d, and 3d sections of which require, in express terms, that the agent who is to do any of [*245] the acts mentioned *in those sections shall be appointed by writing, whereas the 4th and 17th sections contain no such provision.

With regard to the third point, namely, in what cases the principal is bound by his agent's contract. It is of course obvious at first sight, that so far as the agent's authority extends, his principal is bound by all

[1] M'Murty v. Frank, 4 Monroe, 39; Cummings v. Cassily, 5 B. Monroe, 74; Boyd v. Dodson, 5 Humph. 37; Bragg v. Fessenden, 11 Illinois, 545; Damon v. Granby, 2 Pick. 352; Blood v. Goodrich, 12 Wendell, 525; Wells v. Evans, 20 Id. 258; Rhode v. Louthain, 8 Blackf. 413. Perhaps the most important, as well as frequently recurring cases to which this common law rule applies, are those of contracts under seal made by one member of a partnership without authority under seal from the other, as to which the state of the law is attempted to be shown in the note, infra, to page 255.

[2] See supra, the notes to page 240.

acts done in pursuance of that authority. So far, there can be no doubt or difficulty whatever. But the cases in which doubts and difficulties arise, are those in which the agent has gone beyond his authority—has made some contract which his instructions do not authorize—and then the question arises whether his principal shall or shall not be bound by it. Now, in order to solve this question, it is necessary, in the first instance, to understand the distinction between *general* and *particular* agency. A general agent is an agent entrusted with all his principal's business in some specific line, of some specific kind. A particular agent is an agent employed specially for some one special purpose. For instance, if I entrust another with the sale of a particular horse, of which I am desirous of disposing, he is a *particular* agent to transact that particular business. But if I appoint an agent to sell all my horses, and consign horses to him from time to time for sale, he is my *general* agent in that line of business. Now, there is this important distinction between contracts made by general, and those made by *particular agents, namely, that if a par- [*246] ticular agent exceed his authority, his principal is not bound by what he does;[1]—whereas, if a general

[1] Thus, in Batty v. Carswell, 2 Johns. 48, where one who was authorized to sign a note for another for $250, payable in six months, signed one payable in sixty days, it was held that the principal was not liable, because the authority, which was a special one, was not strictly pursued. So, a clerk in a retail store has no authority to sell by wholesale, or to deliver goods in payment of, or security for debts; Beals v. Allen, 18 Johns. 362; Hampton v. Matthews, 2 Harris, 107. So, a clerk employed to do out-door business of a merchant, such as to negotiate purchases and charter-parties, present bills of lading for signature, &c., has no authority to pledge these bills of lading, or receive advances on them; Zachrisson v. Ahman, 2 Sandf. S. C. 68. So, one employed by a merchant to purchase goods, give

agent exceed his authority, his principal is bound, provided what he does is within the ordinary and usual scope of business he is deputed to transact. For instance, if I employ A. to carry a bale of cottons from Manchester to Liverpool, and he sells them, I am not bound by the sale, but may bring an action of trover for them against the purchaser; whereas, had I entrusted them to my factor for the same purpose, I should have been bound by the sale, that being a transaction within the ordinary scope of his business as factor. See Whitehead v. Duckett, 15 East, 408; Fenn v. Harrison, 3 T. R. 757, S. C. 4 Id. 177; Sykes v. Giles, 5 M. & W. 645.(*a*)[1]

(*a*) The law relating to factors is regulated by the 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39.

The former act provides "that it shall be lawful to and for any

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notes, and do all other things in his business as merchant, will not authorize the mortgage of goods in the merchant's store; Reeves v. Baldwin, 1 Smith (Ill.), 170. So, one having authority to collect a note, has none to take a sealed note for the amount, and there will be no merger of the original debt; M'Culloch v. M'Kee, 4 Harris, 289. So, if a shopman authorized to receive money over the counter only, receives it elsewhere than in the shop, the payment is not good; Kaye v. Brett, 5 Excheq. 273. Other instances of the application of this familiar rule may be found in Andrews v. Kneeland, 6 Cowen, 354; Thompson v. Stewart, 3 Connect. 171; Snow v. Perry, 9 Pick. 542; Lobdell v. Baker, 1 Metcalf, 201; Huntingdon v. Wilde, 6 Vermont, 234; Brown v. Billings, 22 Id. 128; Gordon v. Buchanan, 5 Yerger, 71; Bk. of Hamburg v. Johnson, 3 Richardson, 42; Carter v. Taylor, 6 Smedes & Marsh. 367; Shriver v. Stevens, 2 Jones, 258; Scott v. M'Grath, 7 Barbour's S. C. R. 53; Paige v. Stone, 10 Met. 160.

[1] A factor is a general, not a special agent, entrusted with the possession, disposal, and apparent ownership of property; and having a general power to sell, he may do so for cash or on credit, and receive in payment notes or any kind of property. Notwithstanding this general authority, it was, however, held in England, in the case of Patterson v. Tash, 2 Strange, 1178, that "a factor cannot bind

*Now the reason for this is very clear and simple: it is that the public may not be [*247]

person to contract with any agent intrusted with any goods, or to whom the same may be consigned, for the purchase of any such goods, and to receive the same of and to pay for the same to such agent, and such contract and payment shall be binding upon and good against the owner of such goods, notwithstanding such person shall have notice that the person making such contract, or on whose behalf such contract is made, is an agent: provided such contract or payment be made in the usual and ordinary course of business, and that such person shall not, when such contract is entered into or payment made, have notice that such agent is not authorized to sell the same or to receive the said purchase-money." The construction

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or affect the property of the goods by pledging them as a security for his own debt, though there may be the formality of a bill of parcels and a receipt," and this decision has been followed, though with occasional reluctance, by numerous cases; Daubigny v. Duval, 5 Term, 604; Martini v. Coles, 1 Mau. & Sel. 140, 493; Graham v. Dyster, 6 Id. 1, 14; Queiroz v. Trueman, 3 Barn. & Cress. 342; Fielding v. Kymer, 2 Brod. & Bing. 639. Such is recognised as the rule on this side of the Atlantic, unless where it has been altered by statute; Van Amringe v. Peabody, 1 Mason, 440; Kinder v. Shaw, 2 Mass. 398; Odiorne v. Maxcy, 13 Id. 178; Hoffman v. Noble, 6 Metcalf, 74; Holton v. Smith, 7 New Hamp. 446; Newbold v. Wright, 4 Rawle, 195; Kennedy v. Strong, 14 Johnson, 128; Hewes v. Doddridge, 1 Robinson, 143. It has, however, been held that although a factor has not authority to pledge, yet that he can, in the usual course of mercantile dealing, deliver for sale to a broker, auctioneer, &c., the goods intrusted to him, and receive money upon them as an advance, and the deposit will bind the principal, who cannot recover them in trover; Martini v. Coles, supra; Laussatt v. Lippincott, 6 Serg. & Rawle, 386; Martin v. Moulton, 8 N. Hamp. 504; Bowie v. Napier, 1 M'Cord, 1.

But the rule thus established by Patterson v. Tash, having been thought to impose undue restrictions upon the facilities of commercial dealing, has been altered by the acts of Parliament referred to by the English editor, supra, which have been copied with more or less exactness in New York, Pennsylvania, Rhode Island, Ohio, Massachusetts, and some other States. See the note to Laussatt v. Lippincott, in 1 Am. Lead. Cases, 668.

[*248] *deceived. If strangers see A. selling my goods day after day, month after month, and see me

of this statute having given rise to litigations, see Bonzi v. Stewart, 5 Scott, N. R., and Hatfield v. Phillips, 9 M. & W. 647, the 5 & 6 Vict. c. 39, was passed, which enacted, "that any agent who shall thereafter be entrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bona fide* made by any person with such agent so entrusted as aforesaid, as well as for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof; and that such contract shall be binding upon and against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent." And the 4th section enacts, "any bill of lading, India warrant, warehousekeeper's certificate, warrant, or order for the delivery of goods, or any other document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document, to transfer or receive goods thereby represented, shall be deemed and taken to be a document of title within the meaning of this act: and any agent entrusted as aforesaid, and possessed of any such document or title, whether derived immediately from the owner of such goods, or obtained by reason of such agent's having been entrusted with the possession of the goods, or of any other document or title thereto, shall be deemed and taken to have been entrusted with the possession of the goods represented by such document of title as aforesaid; and all contracts pledging or giving a lien upon such document of title as aforesaid, shall be deemed and taken respectively pledges of, and liens upon the goods to which the same relates," &c.; "and an agent in possession as aforesaid of such goods or documents, shall be taken, for the purposes of this act, to have been entrusted therewith by the owner thereof, unless the contrary can be shown in evidence." This act seems to have effectually explained the law on this subject; the only reported case on it is Learoyd v. Robinson, 12 M. & W. 745, which was decided on the facts.

A broker has not, like a factor, the possession of the goods of his principal; his authority is merely to effect the sale, and, having done

recognising the transactions, and receiving payment on that understanding, they may naturally enough suppose that I have given him a general authority to sell, and that they may safely deal with him on my account, and it would be hard indeed, if I were allowed to turn around upon them and say, "True, he has a general authority, but I had revoked it in this particular instance." But, in the case of a particular agent, it is otherwise; for, as he is employed on one particular occasion only, there are no previous acts done by him for his principal, or recognitions of them by the principal, which can have a tendency to mislead any one. And there is no hardship in *saying to the person who deals with him, "You must satisfy yourself that he is my agent at all, and when you do so, you may as well satisfy yourself for what purpose he is my agent, and how far his authority extends."[1] [*249]

Such then is the distinction between a particular and a general agent; and with regard to the latter, there is, for the further protection of the public, this further rule, *that the authority of a general agent is, as far as the public are concerned, measured by the extent of his usual employment.* This is also a rule of common sense as well as law; for what I see a man continually doing with the approbation of another, I may fairly conclude he has a general authority to do. I have not, it is true, seen

so, he is *functus officio.* (See Baring v. Corrie, 2 B. & Ald. 137.) The duties of a broker are too well understood to render any statement of them necessary. As to the distinction between these general duties, and the express agreements into which they may enter, see Boorman v. Brown, in Error, 3 Q. B. 511, 43 E. C. L. R., confirmed by the House of Lords, 11 Cl. & Fin. 1.

[1] Snow v. Perry, 9 Pick. 542; Fisher v. Campbell, 9 Porter, 210; Johnson v. Wingate, 29 Maine, 404; Hatch v. Taylor, 10 New Hampshire, 547.

his instructions, but I am justified in believing that he acts in accordance to them when I see that his principal does not signify disapprobation of his proceedings; and therefore the rule is that where a man permits another to act generally for him in any line of business, he is bound by contracts made by that other in that line of business; although, in truth and in fact, the person so acting may have a limited authority, or even no authority at all. This is laid down by Lord Holt, in homely, but forcible language, in Shower, 95, where it is thus reported:—

"*Memorandum.*—Upon evidence in an assumpsit for wares sold, it was held by Holt, C. J., that if a man send his servant with ready money *to buy [*250] meat or other goods, and the servant buys upon credit, the master is not chargeable.[1] But if the servant usually buy upon tick, and the servant buy some things without the master's order, yet if the master were trusted by the trader, the master is chargeable."[2] There is a case of Rusby v. Scarlett, 5 Esp. 76, which affords a good illustration of this. See also Trueman v. Loder, 11 A. & E. 591, 39 E. C. L. R.; Pickering v. Busk, 15 East, 38; Watkins v. Vince, 2 Stark. 368, 3 E. C. L. R.(*a*)

(*a*) Agency is thus often implied, and the same laws attach to it as well as when it is created by express authority. It is implied, from the position or capacity in which a person acts. Of this description is the agency of brokers, of partners, wives, and servants, all of whom have an implied or constructive authority to bind those for whom they act, or are held to act, as we shall presently see more at large. Many cases occur where there is no such constructive or express authority at the time of the contract; but where it has been supplied

[1] Boston Iron Co. v. Hale, 8 New Hamp. 363. Otherwise, of course, if the servant or agent be ordered to buy, and be *not* furnished with money; Sprague v. Gillett, 9 Metcalf, 91.

[2] Todd v. Robinson, 1 Ry. & Mood. 226.

*But all this is subject to the observation, that the person who contracts with the agent [*251]

by the subsequent assent or adoption of the principal, in which case his liability depends upon the same principles as before; the subsequent ratification is equivalent to a prior command, and the great maxim of agency, "*Qui facit per alium facit per se*," has a retrospective effect. (See Wilson v. Tumman, 6 M. & Gr. 236, 46 E. C. L. R.; and Foster v. Bates, 12 M. & W. 226; and Lewis v. Read, 13 M. & W. 834.)

The usages of trade form material points in determining the authority of an agent, and the custom of an individual as to the general mode and scope of his dealings with tradesmen, would, in the cases above named, limit the implied authority of his servants to bind him by their orders. (Hunter v. Berkeley, 7 Car. & Pay. 413, 14 E. C. L. R.) Wherever acts are done inconsistent with the express directions or with the customary transactions from which agency may be implied, there is, *prima facie*, an excess of authority, and the principal is not bound. In Flemyng v. Hector, 2 M. & W. 181, it was held, on similar grounds, that where there is a managing committee of a club, who choose to deal on credit instead of ready-money payments, which they were alone authorized by the members to do, the members are not bound by such contracts. [And to the same effect is Todd v. Emley, 7 Mees. & Wels. 427, 8 Id. 505.] The same principle applies to partners. (See Hasleham v. Young, 5 Q. B. 833, 48 E. C. L. R., and post, p. 253.)

See instances where the agent had exceeded his authority, and did not bind his principal, in Rotton v. Inglis, 2 Q. B. 667, 42 E. C. L. R.; Fearn v. Filica, 7 M. & Gr. 513, 49 E. C. L. R.; Richardson v. Cartwright, 1 Car. & Kir. 328, 47 E. C. L. R.; and where, having authority, he did not exceed it, and therefore bound his principal; see Pott v. Bevan, 1 Car. & Kir. 325.

An agent who exceeds his authority is personally liable for the contracts he makes; and in Polhill v. Walter, 3 B. & Adol. 114, 23 E. C. L. R., a leading case on this point, an agent was held liable who accepted a bill of exchange *per proc.* under the *bonâ fide* belief that it would be sanctioned by the person for whom he signed. Thus agents are liable for excesses of authority *which they have the means of knowing to be such*. To this extent the law goes in the subsequent judgment in Smout v. Ilbery, 10 M. & W. 1, which clearly classifies and explains the different ways in which an agent may make himself liable, and

[*252] has not *notice of the limitation of his authority. It is very right that a stranger who sees

which we have already partly cited; the classes are thus summarily defined:—First, where there is a "fraudulent misrepresentation of his authority, with an intention to deceive." The second case is, where he has no authority, and knows it, but nevertheless makes the contract as having such authority. In that case, on the plainest principles of justice, he is liable: for he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just, that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. Polhill v. Walter falls within this class.

The next class is that where the agent "*bonâ fide* believes that authority is vested in him, but has, in fact, no such authority." In this case the Court held that he is *still personally liable* (see ante, p. 144, note), and which, we humbly submit, is law, notwithstanding the conflicting judgments upon the principle from which this liability arises. The liability is defended, as we have already shown, on the ground that a man is justly responsible for the carelessness which occasions a misstatement by which others are injured. It must, however, be remembered, that this doctrine is irreconcilable with the subsequent decisions in Taylor v. Ashton, and Collins v. Evans (see p. 144, ante), for it is impossible to draw any sound distinction between the misrepresentations of agents who hold themselves to have an authority they do not possess, and any other misstatement, on the faith of which another is injured. There is one case only in which the agent is clearly not liable for misrepresenting his authority; it is where he had no means of knowing that he was exceeding it. This occurred in the case of Smout v. Ilbery; a widow ordered goods as for her husband, when he was dead, but before his death, which happened in China, could have reached her knowledge. Here she was held not to be liable, on the express ground that she had done no wrong, and was guilty neither of *mala fides*, nor want of due diligence in acquiring knowledge of the revocation—no *omission* to state any fact within her knowledge relating to it. The rule, therefore, resulting from the cases is, that wherever the agent exceeds his authority *either knowingly or negligently*, he is personally liable on his undertaking, if Smout v. Ilbery be law; if Taylor v. Ashton be law, then only if he

an agent *permitted to contract generally for his principal in this or that business should be safe in dealing with him, on the assumption that he has authority. But if he *knows* that he has no authority, in that case to hold the principal bound by a contract made contrary to the agent's real instructions, would be to give effect to a fraud; and accordingly, wherever the person who contracts with an agent *knows* that that agent's authority is limited, and nevertheless contracts with him beyond those limits, he does so at his peril, for the principal is not bound.[1] See Trueman v. Loder, 11 A. & E. 591, 39 E. C. L. R. And on this account it is wise and usual for persons who have been in the habit of employing a general agent, and are desirous of discontinuing him, to give notice to the world of their intention in the Gazette, and to those persons with whom they are in the habit of dealing by circulars. (*a*) [*253]

knowingly exceeds it. It is to be regretted that so important a rule cannot be laid down otherwise than hypothetically. [See supra, the note on page 137 et seq.]

(*a*) The recent cases involving a consideration of the law of agency have chiefly arisen upon partnership contracts; for it has been well said by a learned judge that "all questions between partners are no more than illustrations of the same questions as between principal and agent." (Per Parke, B., in Beckam v. Drake, 9 M. & W. 98.) Partnership exists wherever two or more persons enter into a joint concern or undertaking, of which they are to share the profits and losses.

Now, wherever one or more partners contract for and on behalf of

[1] And therefore it has been held, that where the authority purports to have been derived from a written instrument, or the agent expressly signs the contract, "by procuration," the party dealing with him is put upon inquiry, and is bound to examine the instrument; Attwood v. Muninngs, 7 Bar. & Cress. 278; Witheringham v. Hering, 5 Bingh. 442; Schimmelpennich v. Bayard, 1 Peters, 264; North River Bank v. Aymar, 3 Hill, 262.

[*254] *The consideration of the 4th point must be deferred.

the firm, they act for and bind every member of it: and every member of it is individually liable upon it, whether he be a known or a dormant partner (Fox v. Clifton, 6 Bing. 795, 19 E. C. L. R.), provided the contract be one in the ordinary course of the partnership business, but not otherwise.[1] (Adams v. Bankarts, 1 Cr. M. & Ros. 681; Hasleham v. Young, 5 Q. B. 833, 48 E. C. L. R.)

There is nothing, however, to prevent the parties from confining the credit to an individual partner; and it is a question for the jury whether this has or has not been done. Where there has been nothing to discharge a partner from his liability, or to rebut the presumption of authority to pledge his credit arising from the mere fact of his being a partner, he is clearly liable; but where there are facts to show that it was the intent of the contracting parties to restrict the credit to one of several partners, the liability is limited by such intent. Cases of this description occur where the partner represents himself as the only person composing the firm. (See De Mantort v. Saunders, 1 B. & Adol. 398, 20 E. C. L. R.; Blomfield v. Wilson, 12 M. & W. 405.) [Alexander v. M'Grun, 3 Watts, 320; Jaques v. Marquand, 6 Cowen, 497.] Or where one person has authority to contract on his own account only, and not on behalf of the other partners. (Wilson v. Whitehead, 10 M. & W. 503.) The result is that the liability arising from the naked fact of partnership is *prima facie;* and may be rebutted by direct evidence that credit was not given to the partnership, but to an individual

[1] Thus a partner cannot bind the firm by a submission to arbitration or by a confession of judgment; Adams v. Bankarts, supra; Karthaus v. Ferrer, 1 Peters, 222; Barlow v. Reno, 1 Blackford, 252; Grazebrook v. M'Creedie, 9 Wendell, 437; Harper v. Fox, 7 Watts & Serg. 142; "because it would bind the persons and separate estates of the members, and thus transcend the limits of partnership authority;" nor can one partner give a separate creditor an order on a debtor of the firm; M'Kinney v. Bright, 4 Harris, 399; or otherwise apply partnership effects to the payment of his own debts; Yale v. Yale, 13 Connect. 185; Rogers v. Batchelor, 12 Peters, 230; Livingston v. Hastie, 2 Caines, 249; Moddewell v. Keever, 8 W. & S. 63; Dob v. Halsey, 16 Johns. 34; Langan v. Hewett, 13 Sm. & Marsh. 122. As to the right of a partner to bind the firm by specialty, see infra, note 2 to page 255.

member of it. (See Smith v. Watson, 2 B. & Cr. 401, 9 E. C. L. R., and Peacock v. Peacock, 2 Camp. 45.) This doctrine is very strongly corroborated by one of the latest cases on the point. (Holcroft v. Hoggins and others, 15 L. J., C. P., 129.) The plaintiff had been engaged to write articles in the "Newcastle Advertiser," by a person who at the time of the contract had become in fact the sole proprietor of the newspaper, and the two defendants were sought to be made liable in consequence of their having suffered their names to remain as registered *proprietors of the newspaper in the declaration required to be filed by 6 & 7 Will. 4, c. 76, they having previously been proprietors of the newspaper, but having ceased to be so before the contract in question was entered into. It was adjudged not only that the defendants were not liable, but that the fact of their being co-proprietors was wholly immaterial, though they held themselves out as such, if it was shown that another partner contracted with the plaintiff in such a manner that credit was given to him, and not to them.[1] [*255]

It must also be shown that the debt for which an action is brought accrued during the time the party sued was actually in partnership. He will be liable neither for contracts made before nor after he be-

[1] This, therefore, is put upon the ground of there being a special contract with the single partner, credit having been given to him and not to the other, Ensign v. Wands, 1 Johns. Cases, 171; but it would seem that the mere fact of the plaintiff's notice that the one sought to be charged was, as between himself and the co-defendant, no longer a partner (though for want of compliance with a statutory enactment, he might still be so to the world at large), will not defeat the plaintiff's right to recover against both. Thus, in Andrews v. Schott, 10 Barr, 35, the plaintiffs sued A. & B. on a note signed by A. & Co., and B. filed an affidavit of defence, setting forth that he was a limited partner merely, under the local act regulating limited partnerships, and liable therefore only to the extent prescribed by that act, and that the plaintiff knew this fact, and trusted to the credit of the firm and the general partners, and not to himself; but the Court gave judgment for the plaintiffs, on the ground that the act referred to, expressly prohibited the use of the words "and Company" in the firm name, under the general penalty of making the special partner liable as a general partner, and that the averment that the plaintiffs trusted to the credit of the firm, was not intended as an averment of a special contract, but an inference drawn from the mere fact that the plaintiffs knew that the party was a special partner only.

came a partner, provided he gives proper notice of his retirement. (Beech v. Eyre, 5 M. & G. 424, 44 E. C. L. R., per Tindal, C. J. See also Ridgway v. Philip, 1 Cr. M. & Ros. 415, and Vere v. Ashby, 10 B. & Cr. 288, 21 E. C. L. R.)

It has been long held that dormant partners are equally liable with ostensible partners upon all contracts made for the firm during their partnership; on the equitable principle that the dormant partner being entitled to all the profits of the contract made by the firm to which he belongs, ought also to share in the liability; he having a right moreover to sue others on it, he ought not to be protected from being sued on it by them: for "*Qui sentit commodum sentire debet et onus.*" It is therefore decided that as an undisclosed principal may be made liable as soon as he is discovered, subject to all the equities between the parties; so may an undisclosed partner. Neither is there any distinction between express or written contracts, and those which are implied or verbal. This was decided in the case of Beckham v. Brake, 9 M. & W. 79, expressly overruling a contrary decision in Beckham v. Knight, 4 Bing. N. C. 243, 33 E. C. L. R. But a contract under seal can bind none but those who execute it (per Lord Abinger in Beckham v. Drake), unless express authority be given to them for that purpose.[1]

[1] As a general rule, nothing is better settled, than that the general power of a partner does not extend so far as to enable him to bind the firm by a specialty; Van Deusen v. Blum, 18 Pick. 229; Clement v. Brush, 3 Johns. Cas. 180; Cummings v. Cassily, 5 B. Monroe, 74; Posey v. Bullitt, 1 Blackford, 99; though if the instrument were executed in the presence of and by the direction of his copartner, it would be the deed of both; Ball v. Dunsterville, 4 Term, 313; Overton v. Tozer, 7 Watts, 159; Ludlow v. Simond, 2 Caines's Cases, 1, 42, 55; Mackay v. Bloodgood, 9 Johnson, 285; Henderson v. Barbee, 6 Blackford, 26, 28. But in Gram v. Seton, 1 Hall, 262, and Cady v. Sheppard, 11 Pick. 400, it was determined, after much consideration of all the authorities, that a partner may bind his copartner by a contract under seal, in the name and for the use of the firm, in the course of the partnership business, provided the other partner assents to the contract previously to its execution, or afterwards ratifies and adopts it, and this assent or adoption may be by parol, and such a conclusion is perhaps now sustained by the weight of authority; Pike v. Bacon, 21 Maine, 280; Swan v. Steadman, 4 Metcalf, 548; Bond v. Aitkin, 6 Watts & Serg. 165; Lucas v. Sanders, 1 M'Mullan, 311; Fleming v. Dunbar, 2 Hill, (S. C.) 532;

Nominal partners are as liable as dormant ones, not because they are principals for whom others are agents, but on the ground that credit may *have been given to them, and it is just to the creditor that they should be responsible for the result of holding themselves out to the world; Waugh v. Carver, 2 H. Bl. 242; [Hesketh v. Blanchard, 4 East, 146, ex parte Hamper, 17 Ves. 412.] [*256]

A general notice is sufficient to discharge partners who retire from firms *quoad* the world at large, but an express notice is requisite to discharge them, as regards previous customers. [3 Kent's Com. 67; Farrar v. Deflinne, infra.] This being done, the retiring partner is effectually discharged from all debts subsequently accruing, nor can he be made liable by any unauthorized use of his name by his previous partners (Abel v. Sutton, 3 Esp. 108), though his liability, as well as his power to make admissions, or to release or sue for debts contracted during his partnership, of course remains. (Whitehead v. Hughes, 2 C. & Mee. 310; Porter v. Bristow, 6 M. & Sel. 156; Wood v. Braddick, 1 Taunt. 104; Biggs v. Fellows, 8 B. & Cr. 402, 15 E. C. L. R.) Where notice is given *to* a firm by a retiring partner of some other firm, in all cases of *ordinary* co-partnership notice to one member is notice to all. (Portheuse v. Parker, 1 Camp. 82; Jacand v. French, 12 East, 317). So notice to the Bank of England is held to be notice to all its branch banks (Wallis v. The Bank of England, 5 Ad. & Ell. 21, 4 E. C. L. R.), for notice to the principal is notice to the agent. (Mayhew v. Eames, 3 B. & Cr. 601, 10 E. C. L. R.) This rule, however, does not apply to joint stock companies suing in the name of a public officer, unless the member of it who has notice is also a member of the managing body, such companies not being ordinary co-partnerships. (Powles v. Page, 3 C. B. 16, 54 E. C. L. R. In such cases the notice must be given to the managing body. Such are the general rules which govern the

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M'Cart v. Lewis, 2 B. Monroe, 267; Davis v. Burton, 3 Scammon, 41; Hatch v. Crawford, 2 Porter, 54.

It has moreover been determined, that if the act of one partner be a good and valid act in itself, it will not be rendered the less so if done by a specialty, provided the seal do not vary the liability; Deckard v. Case, 5 Watts, 22; Henessy v. Western Bank, 6 Watts & Serg. 301; Tapley v. Butterfield, 1 Metcalf, 515, which cases, and many others upon the subject of the power of a partner to bind the firm, the student will find classified in the note to Livingston v. Rosevelt, 1 Am. Lead. Cases. 460.

discharge of retiring partners from their liability, but wherever there is an express agreement that a creditor shall accept the liability of the retiring partner, instead of that of the remaining firm, the general rule is of course waived by the special agreement. (See Kirwan v. Kirwan, 2 Cr. & Mee. 623; and Thompson v. Percival, 2 B. & Adol. 927, 22 E. C. L. R.)

In Farrar v. Deflinne, 1 Car. & Kir. 580, 47 E. C. L. R., the defendant had been a dormant partner, but ceased to be so before the [*257] debts accrued for *which the action was brought. The plaintiff had known of the partnership, but the dissolution not having been advertised, he had no knowledge of it. Mr. Justice Cresswell said, in summing up the case, "The law stands thus: if there had been a notorious partnership, but no notice had been given of the dissolution thereof, the defendant would have been liable. If there had been a general notice, that would have been sufficient *for all but actual customers;* these, however, must have had some kind of actual notice. If the partnership had remained profoundly secret, the defendant could not have been affected by transactions which took place after he had retired; but if the partnership had become known to any person or persons, he would be in the same situation *as to all such persons,* as if the existence of the partnership had been notorious." (See also Evans v. Drummond, 4 Esp. 88, 90, per Lord Kenyon, C. J.)

Where bills are drawn by partners in trade, the general authority implied by the custom of merchants binds each partner: but not so where the partnership is not of a commercial nature, such as attorneys for instance, in which case it must be shown that the party accepting or drawing had special authority to do so, even where it is done in the name of the firm. (Hedley v. Bainbridge, 3 Q. B. 316, 43 E. C. L. R.; Levy v. Pyne, 1 Car. & Marsh. 453, 41 E. C. L. R.) Where one partner signs for the firm, he is not separately liable, but the firm alone. (Exparte Buckley in re Clarke, 14 M. & W. 469, overruling Hall v. Smith, 1 B. & Cr. 407, 8 E. C. L. R.)

Partners are not liable for the fraudulent contracts of a copartner, if they can prove the knowledge of the fraud by the plaintiff. (Musgrave v. Drake, 5 Q. B. 185, 48 E. C. L. R.) Neither are they bound where an express warning was given to the plaintiff by the partners sought to be charged.

For the rules of pleading in actions by and against partners, see 1 Saund, 291, b. et. seq.

CONTRACTS BY PUBLIC COMPANIES.

The peculiarities attending contracts to which public companies are parties, have acquired greatly increased importance from the tendency of commercial enterprise since these lectures were written, and it is *requisite that the principles which govern them be developed. [*258]

Most joint stock companies formed since November 1, 1844, are now regulated by the 7 & 8 Vict. c. 110, and according to the 2d section.

"Except where the provisions of this act are expressly applied to partnerships existing before the said first day of November, it shall be held to apply only to partnerships, the formation of which shall be commenced after that date: provided, nevertheless, that, except as hereinafter specially provided, this act shall not extend to any company for executing any bridge, road, cut, canal, reservoir, aqueduct, waterwork, navigation, tunnel, archway, railway, pier, port, harbour, ferry, or dock, which cannot be carried into execution without obtaining the authority of Parliament; provided, also, that except as hereinafter is specially provided, this act shall not extend to any company incorporated, or which may be hereafter incorporated, by statute or charter, nor to any company authorized or which may be hereafter authorized, by statute or letters-patent, to sue and be sued in the name of some officer or person."

Now under this act it is required that all companies shall be registered first provisionally, and afterwards completely registered. And before provisional registration (sect. 24), the promoters of a company are not to allot shares, issue scrip, or receive deposits, either absolutely or conditionally, *or make any contract whatsoever in the name*, or on the behalf of *such* intended company, under the penalty of a sum not exceeding twenty-five pounds, recoverable by any person by action of debt.

When provisionally registered the intended company may open subscription lists, allot shares, and receive deposits of not more than 10*s.* per cent. on every share; and also in companies executing any "railway" and other works by act of parliament, such further deposit as the standing orders require. But they are "not to make calls, not to purchase, contract for, or hold lands, nor to enter into contracts for any services, or for the execution of any work, or for the supply of any stores, except such services and stores, or other things, as are

[*259] necessarily *required for the establishment of the company; and except any purchase or other contract to be made conditional on the completion of the company, and to take effect after the certificate of complete registration, act of parliament, or charter, or letters-patent, shall have been obtained; and except, in the case of companies for executing such works as aforesaid, contracts for services in making surveys and performing all other acts necessary for obtaining an act of incorporation, or other act for enabling the company to execute such works."

All contracts, therefore, which do not fall within the pale of these sections are illegal and cannot be enforced.

When the company is completely registered, if it be not one which requires an act of parliament, it is fully empowered to act and contract like any other company, subject, however, to the proviso contained in section 44, which requires that "except contracts for the purchase of any article, the payment or consideration for which doth exceed the sum of fifty pounds, or for any service, the period of which doth not exceed six months, and the consideration for which doth not exceed fifty pounds, and except bills of exchange and promissory notes: be it enacted, that every such contract shall be in writing, and signed at least by two of the directors of the company, on whose behalf the same shall be entered into, and shall be sealed with the common seal thereof, or signed by some officer of the company on its behalf, to be thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case." All contracts under 50*l.* are to be entered into by some officer authorized by the company, who is to report it to the secretary, under pain of forfeiting its amount.

There are similar provisions with respect to notes and bills of exchange, and every deed *must* be signed by two directors of the company. Ss. 45 and 46.

No contract, therefore, can be enforced which does not comply with these requirements. It is worthy of remark that these clauses will, in all probability, effect considerable change in the mode in which agreements are drawn to which companies are parties, and which [*260] ought not *to be in the name of trustees, but according to the express terms of this section in that of two directors of the company. Such are the regulations respecting contracts which affect new joint-stock companies falling within the description given in the above cited section.

The act also provides with regard to the sale of scrip, that "until such joint-stock company shall have obtained a certificate of complete

registration, and until any such subscriber or person shall have been duly registered as a shareholder in the said registry office, it shall not be lawful for any such person to dispose, by sale or mortgage, of such share, or of any interest therein, and that every contract for, or sale or disposal of such share or interest shall be void, and that every person entering into such contract shall forfeit a sum not exceeding 10*l.*

It has been decided by the Court of Exchequer, in the case still unreported, of Young v. Smith, on Jan. 26, 1846 [15 M. & W. 121], that this section does not relate to railway companies. In other companies within the scope of the act, all such sales are illegal and void; and, therefore, were any such sales effected, the vendee could not recover the purchase-money from the vendor upon the principles already fully discussed in treating of illegal contracts.

The case, however, is different where the sale of scrip has been legal, and where the undertaking having been abandoned, there is a failure of consideration. The right of action by the vendee to recover the purchase-money depends on two main points: first, whether the vendee had become a partner in the concern, in which case it is clear that no action will lie against his copartners; and if that be not so, then, secondly, whether the company have failed to carry out the terms of the prospectus, or other professions, on the faith of which the purchase was made.

Now the mere purchase of scrip will not constitute the purchaser a partner in the undertaking, unless he signs the subscribers' agreement or subscription contract, and thereby embarks in the concern. The case of Fox v. Clifton, 6 Bing. 776, is a leading authority on this point, and it is there held that persons are not partners who have not been entitled at any time to demand a share *of profits, and where the conditions are not fulfilled upon which they [*261] subscribed, and where the matter has proceeded no farther than an *offer* to become partners in a *projected* concern which has proved abortive before the period at which the partnership was to commence.

And the judgment in that case limits partnership to "*those subscribers, who, by executing the deed, have declared themselves partners,* and to any who have by their subsequent conduct recognised and adopted the acts and contracts of the directors," thus holding themselves out as such.

These, as regards public companies, are the predicaments of partnership; and other cases have borne out this doctrine.

In Holmes v. Higgins, 1 B. & C. 74, several persons subscribed to

an undertaking for forming a railway and obtaining an act of parliament for that purpose. A bill was brought into parliament accordingly, but met with opposition, but was ultimately withdrawn. It was held that the persons so subscribing were an association of persons for a common purpose, and therefore *partners* in the undertaking.

The recent case of Lucas v. Beach, Bart., 1 M. & Gr. 417, was that of an inchoate partnership for the purpose of obtaining an act of parliament; the plaintiff was held to be a partner, having subscribed for two shares, and therefore disentitled to sue the committee for work and labour done. Holmes v. Higgins was cited and confirmed by Tindal, C. J., in the judgment.

In Maudsley v. Leblanc, 2 Car. & Pay. 409, Bayley, J., held that, though there was no evidence that the defendant had, according to the terms of the prospectus, executed the deed, "he should take it for granted that he had done so: that he was liable *as a partner*, he was at the meetings of the directors acting from time to time, and went to see the works in progress: and therefore it was impossible to say he was not a partner." See also Beech v. Eyre, 5 M. & Gr. 415.

In Bourne v. Freeth, 9 B. & Gr. 632, on the other hand, it was held that where a *prospectus* had been signed by the defendant merely [*262] *importing that a company *would be* formed, this was not sufficient alone to constitute a partnership, inasmuch as the defendant "had not thereby given authority to any person to carry on the business on his account." Dickenson v. Valpy, 10 B. & Cr. 141, to which we shall presently refer, is to the same effect. See also Meigh v. Clinton, 11 A. & E. 418; and Pitchford v. Davis, 5 M. & W. 2.

These cases fully establish that there must be some act, express or constructive, constituting a man a member of a company, to render him a partner at all.

If the purchaser of scrip be not a partner, the next question is, have the company failed to fulfil their implied contract, and to what extent they are liable in the event of failure.

This must necessarily depend in great measure, on the facts of each case. Where, however, the company have acted *bona fide*, and have not failed in efforts to carry out the undertaking and give effect to the contract with the scrip-holder, there is but one case which goes the length of deciding that they are liable, and it is submitted that that case cannot be sustained.

In Kempson v. Saunders, 4 Bing. 5, the defendant sold the plain-

tiff shares in a projected company for constructing a railroad, upon which a deposit had been paid by the original holder, of whom they had been purchased by the defendant; the committee who had framed the project and issued the scrip agreed that *nothing should be done till the sanction of the legislature was obtained;* they afterwards abandoned the project, and no act was obtained; upon the failure of the scheme, the plaintiff sought to recover the purchase-money in an action for money had and received to his use. A verdict was found for the amount, on the ground that the consideration for the payment had failed; and it was upheld by the Court of Common Pleas. Best, C. J., said, "The defendant sold a nothing, an alleged title of no value. If he bought of another, he may sue the seller, and the seller the party from whom he purchased, till at last he come to the original projectors." As regards this case, whatever may have been the law when joint-stock *companies were comparatively in their infancy, it is clearly different now when they are regulated and sanctioned by act of Parliament, and when it would be obviously a most serious restraint on trade, so far to check associations for purposes of commercial enterprise, as to make them guarantee the ultimate success of every scheme legitimately conducted by them, and insure it against all hazards and contingencies to those who chose voluntarily to embark in it. [*263]

But where, as in the leading case of Nockels v. Crosby, 3 B. & Cr. 814, the party purchasing had not joined the company, but paid money on the faith of a prospectus or scheme which was never carried out, it was held that the purchaser was entitled to recover his money, and that case has been very recently acted on in that of Walstab v. Spottiswoode, 15 Law Jour. Exc. 193 [15 M. & W. 501], (one of considerable hardship to the defendant), but which was necessarily governed by the same principle. The plaintiff had applied for an allotment of shares in a projected railway, and paid her deposit money upon a promise that she should receive the scrip. The shares were allotted, but before the delivering of the scrip the project was obliged to be abandoned, and the deposit, minus the share of the plaintiff in the expenses, was offered to her, but she refused to receive it, and sued for the whole amount. The court held that she was entitled to it, first, because she had never become a partner; and, secondly, because the affair must have necessarily proved abortive, and did not realize the terms of the prospectus.

The liability of those who embark in a public company to those who enter into contracts with it, depends upon grounds somewhat different. According to the tenor of the leading cases, *every person*

who is either actually a partner, or who by his acts has held himself out as such, is liable upon such contracts as the company had a right to make consistently with its objects and the usages of business.

In such cases responsibility arises from the implied authority which flows from the relation of partnership. Thus, either actual or quasi partnership will suffice. As regards actual partnership, it is laid [*264] down in the leading case of *Dickenson v. Valpy, 10 B. & Cr. 140, per Parke, B., that "if there is a complete partnership between two or more persons, one partner does communicate to the other standing in the relation of complete partner all authorities necessary for carrying on the partnership, and all authorities usually exercised by partners in the course of that dealing in which they are engaged."

Now this rule was applied to the case of shareholders; and a shareholder is essentially a partner, for the very word is a definition of partnership, and we have seen that it has been so held, and that a shareholder is liable accordingly. Nevertheless, we find that in the subsequent case of Tredwen v. Bourne, 6 M. & W. 461 (in which case a shareholder in a company was held to be liable for the ordinary dealings of such company, who had taken an interest in the concern), Mr. Baron Parke says, that "if the case had stood merely on the fact of his being a shareholder, I should have thought it was not sufficient." Lord Abinger, however, appears to be of a different opinion, and puts the judgment simply on the point, "whether such companies do not ordinarily deal on credit; if they do, *the shareholders are liable,* unless by some evidence the party shows that in the particular case he is not liable." In other words, that the actual partnership alone suffices.

This view is so strongly supported, not only by other judgments, but by the law of partnership, that it must prevail over the judicial doubts which have occasionally been cast on this very important question. Shareholders and subscribers alike embark together in a concern of which they expect to share the profits or losses. They would thus be liable by the doctrine in Dickenson v. Valpy. They are liable as partners, wherever they have agreed unconditionally to become shareholders, and there are cases which settle the point. In Ellis v. Schmæck, 5 Bing. 521, which was an action for goods supplied (to a mining company), the defendant was held liable, quà shareholder, for all the goods that had been supplied from the first, and before he had taken any part by attending meetings, &c. In Lawler v. Kershaw, 1 M. & M. 93, in a similar action, one of the [*265] defendants was charged merely as a *shareholder, on the strength of having paid a deposit when part of the goods

had been supplied, though the deed of partnership had not been signed. The subsequent execution of the deed was held by Lord Tenterden, C. J., to be a good recognition of his former payment as a transaction connected with the partnership, and shows that in making it he considered himself as becoming a partner. In the recent case of Beech v. Eyre, 5 M. & G. 415, it was held that a defendant who signed an agreement in February for obtaining an act of Parliament, and subscribed for shares, was liable for goods supplied to the company in July (although the deed of settlement was not executed until September) in virtue of the deed of contract in February. He had subsequently attended meetings, but the court held that he was a partner at the time when the goods were supplied. "There was clearly evidence from which the jury might infer that he was from the first a shareholder in the company." See also the cases where subscribers were held not entitled to sue their committees on the score of partnership. (Lucas v. Beach, supra.) The cases with respect to dormant partners prove that the question of credit having been given to the *individual member* sued, is immaterial, if he be a partner, and not a question for the jury at all. A strange confusion is often made between those cases of actual partnership which alone constitutes liability, and those of quasi partnership. In the latter, the holding himself out as the person charged is essential to his liability, as we shall presently see; in the former case it is perfectly immaterial whether he holds himself out or not. In the case of Gardiner v. Childs, 8 Car. & Pay. 345, the very existence of the partnership of the defendant was unknown to the plaintiffs, and yet Lord Denman, C. J., said, in giving judgment,—"In my opinion the rule of law is this: if these defendants were partners in the publications at the time when the orders were given, they are liable for the things furnished to complete that publication, although Messrs. Westley and Davis were liable in the first instance. I can conceive that all the partners may not be *liable for all that is done by each individual partner, as in the case suggested by Mr. Justice Gibbs, but I think that in such cases there should be something exclusive in the nature of the transaction not only that they should not be known, but that the ordering of the goods should be the exclusive act of the particular partner. The question is, whether these accounts convince you that the partnership existed at the time when the goods were furnished; if they do, then the defendant will be liable." This judgment was afterwards confirmed by the full court. [*266]

In Wintle v. Crowther, 1 Cr. & Jer. 316, we have the authority of Bayley, B., to the same point: it having been pleaded that one of the defendants was a secret partner, *and that the plaintiffs knew nothing of him*, "We are of opinion," said that learned judge, "that where a partnership name is pledged, the partnership, of whomsoever it may consist, and whether the partners are named or not, *and whether they are known or secret partners*, will be bound, unless the title of the person who seeks to charge them can be impeached." Beckham v. Drake (supra), is a strong authority also on the same point.

The above remarks apply to all trading companies. A fortiori are they applicable to railway and other companies, of which the object and functions are regulated by the Joint Stock Company Act.

Preliminary expenses are, as we have seen, prescribed and published. Not only are they authorized, but no one can become a subscriber without full knowledge that they must be incurred; he, therefore, assents to their being incurred, and to bear his share of them whether they answer his purpose or not.

Nor is this implied assent alone, for the subscriber also signs a deed by which he expressly covenants to the effect that "the managing directors shall take such proceedings as they in their discretion shall think fit, or as Parliament shall require, &c., in the ensuing or any subsequent session or sessions of Parliament, for incorporating, establishing, and regulating the company, and authorizing the construction, &c., of all works incidental thereto, and for carrying out [*267] and affecting any of the hereinbefore mentioned objects, *or any part or parts, portion or portions thereof."

Nor do they stop there, for it is usual to insert what follows:—"That the parties hereto of the first part shall and will save, defend, *and keep harmless and indemnify* the said managing directors, and each and every member thereof, of and from all payment, *loss or losses, costs, charges, damages, and expenses whatsoever*, which such managing directors or any member thereof have or hath already incurred or become liable to in or in reference to the formation of the said intended railway, or the establishment of the company, &c., &c., in the exercise and execution of the powers and the authorities hereby vested in them or him as members or a member of such managing directors," &c.

The responsibility of shareholders, therefore—thus clothed with all the attributes of partners, thus expressly authorizing and cognisant of the contracts of their agents the directors—is as perfectly

within the pale of an actual partnership liability as it is possible to conceive a case to be.

But wherever, according to the rule we have ventured to state, the directors or managing body of a company, whether under the act or not, have exceeded their functions, or have failed to fulfil the terms or conditions upon which the shareholders subscribed, their responsibility ceases with the presumption of assent from which it sprung; for the liability of the principal is limited to the authority of the agent. It is well said in Dickenson v. Valpy, by Parke, J., that "an authority upon condition not fulfilled is no authority at all."

But even in this case where a shareholder would have been exempted from liability by such excess or laches on the part of the directors, if he afterwards recognise their authority, and acquiesce in their acts, he waives the discharge, and his liability returns. In Pitchford v. Davis, 5 M. & W. 2, it was held that a subscriber is not liable unless the terms of the prospectus, if conditional, are fulfilled. Mr. Baron Parke said, "The defendant by taking shares in this speculation, gives authority to the directors to bind him by their contracts, in the event of the proposed number of shares being disposed of, and the *proposed capital obtained. The secretary who gives the orders to the tradesman is the party [*268] primarily liable; the directors also who give the order to the secretary, may be liable. A third party (shareholder) may become liable if it can be shown that he has authorized the act of the directors in making the contract. But by proving the defendant to be an original subscriber, unless the proposed capital is raised, no such authority is shown."

According to the rule above laid down, we have now to consider the cases in which, though no actual or complete partnership exists, the party charged has thus authorized the acts of the managing body, and thus incurred liability. Here it is that the doctrine of holding oneself out takes effect, for it is on the ground of a *representation* of partnership to the creditor that the liability rests. Nor need the representation be direct. It has been held in Dickenson v. Valpy, that "he would be bound by an indirect representation to the plaintiff arising from his conduct, as much as if he had stated to him directly, and in express terms, that he was a partner." This representation must be to *the plaintiff*, and not to the world, "for that is a loose expression," said Parke, J., "*under such circumstances of publicity, as to satisfy a jury that the plaintiff knew of it, and knew him to be a partner;*" and Mr. Justice Cresswell, in the recent case

of Wood v. The Duke of Argyll, supra, strengthens this requirement, and renders the sufficiency of the representation conditional upon the fact, that "the plaintiff has acted upon the faith of such representations. It is not sufficient," he says, "to show that a party has held himself out as partner, unless it be also shown that he has been so treated by the plaintiff who sues him." (6 M. & Gr. 932.) The sort of acts which amount to this can be best gathered from the cases decided on this point. For instance, in Maudsley v. Le Blanc, 2 Car. & Pay. 409, Bayley, J., held that, though there was no evidence that the defendant had, according to the terms of the prospectus, executed the deed, "he should take it for granted that he had done so; that he was liable as a partner, he was at the meetings [*269] of the directors *acting from time to time, and went to see the works in progress; and therefore it was impossible to say he was not a partner." Attending meetings and taking any part as a promoter, without any question renders a man liable. See Doubleday v. Muskett, 7 Bing. 110, and that class of cases. And this principle has been carried further in a very recent case. In Lake v. Duke of Argyll, 6 Q. B. 477, it was held that the mere fact of the defendant having presided as chairman at a meeting at which the resolutions to employ the plaintiff were passed, was sufficient to make him liable, although he had taken no further part, though the company was not formed, and the directors not formally appointed. In Fox v. Clifton, it is said, "where a person allows his name to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, is the very ground upon which he is estopped from disputing his liability as a partner:" neither does he divest himself of his anterior liability by simply ceasing to act. (See Doubleday v. Muskett.) See further instances in Kedwelly Canal Company v. Raby, 5 Price, 93; Bell v. Francis, 9 Car. & Pay. 66. They are not, however, liable for contracts made *before* they assented to act; not even if the company derive benefit from them after such assent. (See Young v. Hunter, 4 Taunt. 582.)

There does not appear to be any sound distinction in law between the position of a shareholder and that of a member of a provisional committee, or between the latter and a member of a managing committee, as regards their respective liability to the creditors of the company. They certainly cannot be held liable as *agents* if acting within the scope of their authority; their liability must consist either in being actual partners, or in holding themselves out as such; but so equally does the liability of a mere shareholder. The only difference in point of fact is, that they oftener perform

acts which represent them as partners; but still it is submitted that the same conditions of liability which have been stated to apply to shareholders, attach equally to them. If they are shareholders or quasi partners, by holding themselves out as such, they are on that account liable, but not as *committee men, inasmuch as no ex officio liability attaches to them. Two nisi prius deci- [*270] sions (Low v. Wilson, and Banks v. Goode, 7 Law Times, 286), have recently started the novel doctrine that where there exists a managing committee, neither the provisional committee nor the shareholders are liable; but it is difficult to discover upon what authority these eccentric cases rest, certainly not upon that of Flemyng v. Hector, 2 M. & W. 181, for there it was decided that the managing committee and not the members of a club were liable, where the committee had exceeded their limited authority; and it was also expressly ruled that the case was *not* analogous to a trading partnership, but was entirely a question of principal and agent. In the absence of any authority competent to overrule the current of cases decided in banc, it is submitted, that if a member of a provisional committee be not liable to the debts of the company, it is simply because he is not in the position of a partner (a case not likely to occur frequently), or being so, is exempted on the score of an excess of authority on the part of the managing body. Before the mere existence of a managing body can discharge all other members of a company from liability for debts contracted on their behalf, and by their authority, the law of partnership must be materially altered.

No member of a company can sue another; it has been therefore decided, as we have seen, that where actual services are performed for a company by one of its members, he cannot recover at law. (Holmes v. Higgins, supra; Goddard v. Hodges, 1 Cr. & Mee. 33.) But where he becomes a partner subsequently to the work being done, he is not disentitled to recover. Lucas v. Beach, 1 M. & Gr. 417.

Allottees not being shareholders may sue or be sued at law, in the event of a breach of contract between them and the company; were the committee and allottees partners, of course no action would lie; but they are not. Fox v. Clifton, supra, however decides, that where a company is only proposed, and not actually formed, neither an application for shares, nor even a payment of the deposit, renders the allottee a partner.

*Whenever the allottee has made an unconditional pro- [*271] mise of subscribing, and the shares are allotted to him, without any stipulation by the company that they shall be forfeited on nonpayment of the deposit, the allottee is liable for his breach of contract. (See ante, p. 93, note.) He is also liable in equity.

A person who has agreed to become a partner for a term of years, or upon any other defined terms,—not being a general partnership which might be immediately dissolved,—is compellable in equity specifically to perform his contract. That is well established by the cases of Buxton v. Lister, 3 Atkyns, 383; Adderley v. Dixon, 1 Sim. & Stu. 611; Hibbert v. Hibbert, Rolls Trin. T. 1807, cited in Collyer on Partnership, 2d edit. 133. And any misrepresentation or misconduct on the part of the projectors or managers of the scheme, or a material and unauthorized departure from its objects as described, would be a sufficient defence on the allottee's part to such a suit or action. It is not unlikely also that it would be alleged by the defendant that so many of the other allottees of shares, &c., had not paid their deposits, that the project must prove abortive. Any defence falling within the principle of *non in hæc fœdera veni* would suffice, but not, it is presumed, any which did not sustain a charge of misconduct on the part of the company itself. Allottees, who have been induced to take shares by false representations or misconduct of the company, may maintain an action to recover their deposits. (Wontner v. Sharp, 7 Law Times, 287, per Erle, J.; see also Pitchford v. Davis, supra.)

Companies derive powers of compelling the payment of calls by shareholders, from the acts or deeds of settlement by which they are constituted. Their power of enforcing these are, however, conditional, upon their having in the first place fulfilled their duties, and complied with the terms upon which the shares were allotted and taken. It is, for instance, often a condition precedent, that all the capital of the company shall have been subscribed, and that the shareholder shall have been an owner at the time of the call, also that due notice was given of it, and many other matters which arise [*272] out of the construction *put in each case on the terms of the act or deed. (See cases in Aylesbury R. Company v. Mount, 7 M. & Gr. 898; Hutt v. Giles, 12 M. & W. 492; Sheffield and Manchester R. Company v. Woodcock, 7 M. & W. 588; Smith v. Goldsworthy, 4 Q. B. 430; Norwich and Lowestoff Navigation v. Theobald, 1 Moo. & Mal. 151; Miles v. Bough, 3 Q. B. 845; West London R. Company v. Bernard, 3 Q. B. 873.)

Where no such impediment exists to the claim of the company, all new companies are empowered, by the 55 s. of 7 & 8 Vict. c. 110, to sue the defaulter in an action of debt, and similar powers are given to other companies for the recovery of the calls due. This forms an exception on this subject to the general rule that partners cannot sue each other.

In all other cases of claim between one member of the company upon another, or directors and shareholders, the remedy is exclusively to be sought in equity and not at law. Where, for instance, a sufficient case of misrepresentation or misconduct can be proved against directors or projectors of projects, subscribers will have no difficulty in recovering their deposits by a suit in equity. It must be observed, that the relief in cases of this class is founded strictly upon the jurisdiction the court of equity has in matter of *fraud*, and it will not be extended to unintentional mistake or erroneous judgment, not amounting to fraud or misconduct.

Where the funds have been mismanaged, or where the objects of the association having failed, the subscribed funds have not been applied or accounted for, the form of the bill must be for an account and application of the funds to the objects of the undertaking. It was at one time held that no decree for an account between partners could be made in equity, except upon a bill praying for a dissolution and general winding up of the partnership: and to *such* a suit it was and still is an inflexible rule that all the partners must be actual parties. Thus where the partners are as numerous as the subscribers to a railway project, it would be practically impossible to proceed with such a suit. A dissolution is, however, no longer necessary for an account. The question came *under the consideration of Lord Cottenham, Ch., in Wallworth v. Holt, 4 [*273] Mylne & Craig, 619, who thus stated the principle upon which the courts of equity will give relief to partners in companies under such circumstances. "The result, therefore, of these two rules would be, —the one binding the court to withhold its jurisdiction, except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it—that the door of this court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. This result is quite sufficient to show that such cannot be the law; for, as I have said upon other occasions, I think it the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy." See also Richardson v. Hastings, 7 Beav. 323, where Lord Langdale says, "The court has even gone to this extent; in the case of an insolvent partnership not formally

dissolved, it has permitted a bill to be filed by one or more on behalf of the rest against the governing body, to have the assets collected and applied, as far as they would go, towards the discharge of the debts; and that, without seeking to ascertain the rights and liabilities of the parties as between themselves, and consequently leaving litigation as between those parties entirely open after the debts have been paid; that is, it has sanctioned a suit which sought nothing but to compel a satisfaction *pro tanto* of the partnership debts, as far as the deficient means would extend, and then have all the members of the partnership exposed to such litigation as the unsatisfied creditors might choose to adopt for the recovery of the remainder of their debts, and also leave the partners liable, as amongst themselves, to [*274] such suits for *contribution as the particular circumstances of the case might render necessary."

Wherever judgment has been enforced against any shareholder of a public company under 7 & 8 Vict. c. 110, he is entitled to contribution, as in ordinary cases of copartnership. (See ss. 66 & 67.)

The transfer of shares is expressly legalized by the Act relating to companies requiring the sanction of Parliament, and also by the Joint Stock Companies Act; cases therefore similar to those of Duvergier v. Fellows, 5 Bing. 248, and Josephs v. Pebrer, 3 B. & Cr. 638, are scarcely worth noticing.

Where shares are transferred, the transferee is usually clothed with the liabilities of the transferror; it is certainly implied in the contract of transfer that he shall: and where the company is incorporated by act of Parliament, and the name of the scripholder is entered in the company's books, it has been held that "the assignees hold the shares on the same conditions, and are subject to the same rules and orders, as the original subscribers, and are to all intents and purposes substituted in the places of the original subscribers," Huddersfield Canal Company v. Buckley, 7 T. R. 36, per Lord Kenyon, C. J., and the same rule is applied to recent companies in the case of the London Grand Junction Railway Company v. Freeman, 2 M. & Gr. 606, where it is laid down that "it was the manifest intention of the original subscriber that the holder of his scrip certificate should be treated as his assignee, and be registered accordingly as a shareholder. And we see nothing in the provisions of the act, or in any general principles of law, to prevent this intention from being carried into effect."

The mode and registration of transfers in railway companies are provided for by 8 Vict. c. 16, ss. 14 & 15. The only case in which any difficulty in determining the liability of companies and parties to transfers can well arise, is in that of the transfer of scrip before

the company has obtained its act, and which we have seen is not rendered illegal as regards railway companies, by the 7 & 8 Vict. c. 110, s. 26.

Now where the subscriber has sold his scrip before incorporation, the company may *refuse to register the scripholder. The [*275] case of the Kidwelly Canal Company v. Raby, 2 Price, 93, seems to decide this point. There the act passed in June, 1812, and the subscribers' names were inserted, except the defendant's, but his name was omitted in consequence of his expressed wish, before the act was obtained, that his subscription should be withdrawn; but he was held bound to pay the calls, and it was ruled that he could not withdraw or escape from his liabilities as a shareholder without the formal consent of all the others.

Persons thus bound cannot discharge themselves by what, though *a legal sale,* is still an *unauthorized transfer* to some person between whom and the company and the trustees, there is no privity of contract. The directors may therefore refuse to register any but the subscriber, and they have a right to compel him to come in and register; for the transfer clause which regulates how shares shall be transferred after the act is obtained, enacts that "*until* such transfer has been *so* delivered as aforesaid, the vendor of the share shall continue liable to the company for any calls," &c. Thus even upon a transfer after the act, *unless it be duly certified,* the original subscriber is liable; *à fortiori* is he liable when the transfer takes place before the act is passed.

The premature transfer of scrip is a barren contract. The vendor seldom undertakes that the vendee shall be registered, and unless he does, the latter has no remedy in the event of a refusal by the company to accept him, as in Deeman v. Lloyd, 14 Law Jour. Q. B. 165, where there was an express undertaking by the vendor. On the other hand the scripholder, it is submitted, cannot be compelled to register himself, for in the first place, he has contracted no liability to the company, and may, if he pleases, forego his claim, which in some cases it may be his interest to do. In this case the covenant between the company and the original subscriber must hold good, and the latter will be held bound to fulfil it, and pay the calls, whether he is registered or not, according to the requirements of the 8 Vict. c. 16, s. 21. "That the several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall *pay the sums respectively subscribed, or [*276] such portions thereof as shall from time to time be called for by the company, at such times and places as shall be appointed by

the company." Neither, in the second place, does the scripholding vendee usually undertake to indemnify the vendor.

In equity, an attempt was frustrated to obtain indemnity in a similar case. (Jackson v. Cocker, 4 Beavan, 59.) The Master of the Rolls observed, "This is called a purchase of shares, when it is a purchase of mere certificates, and the question is, whether there is a contract on the part of the defendant to become a proprietor at all events? I cannot find it expressed, and I cannot raise it by implication of law." In Humble v. Langston, 7 M. & W. 517, this case is distinguished from that of an original lessee compelled to pay damages incurred by a breach of covenant by the assignee of the lease. But if the company choose to register the scripholder, and he choose to be registered, and *if he be*, there is express authority, not only that he becomes liable, quâ shareholder, for calls, &c., but that the original subscriber is discharged from such claims arising subsequently to the registration of the transfer, in the above cited case of the London Grand Junction Railway Company v. Freeman. The court having referred to the general and well-known usages with respect to these transfers, said, "Taking all these things into consideration, the court cannot doubt that all are made liable to pay calls, who, having before the passing of the act become entitled by the then well-understood method of transfer, were afterwards registered as shareholders."

Even if the company refuse to register a mere scripholder, the subscriber can register himself and transfer to the scripholder, and thus defeat the refusal.

The various liabilities are provided for in the 8 Vict. c. 16; the 8th section of which makes every one a shareholder who has subscribed the required sum, "or shall *otherwise have become entitled to a share in the company*," *and who has been registered.* The 11th section of the same statute entitles the holder to a share in the certificate, [*277] which is evidence of his proprietorship. By section 14, the *shareholder may transfer all his interest in the capital stock and his "shares" to the transferee, who thereupon *de facto* becomes the "*shareholder.*" The 15th section, as we have seen, enacts that *until* a transfer has been so delivered as required by the act, the vendor is liable. The conclusion is, therefore, that *after* it, he ceases to be liable for calls; and section 23 makes the *shareholder* liable to pay the calls, and against shareholders, section 25 limits the remedy in default of payment. "If, at the time appointed by the company for the payment of any call, any shareholder fail to pay the amount of such call, it shall be lawful for the company to sue such *shareholder* for the amount thereof."

The 26th section of the Joint Stock Company's Act, prevents any doubt as to the liabilities of sale of *scrip* in such companies, for it enacts that "with regard to subscribers, and every person entitled, or claiming to be entitled, to any share in any joint stock company, the formation of which shall be commenced after the 1st day of November, 1844, that until such joint stock company shall have obtained a certificate of complete registration, and until any such subscriber or [redacted]erson shall have been duly registered as a shareholder in the said [redacted]stry office, it shall not be lawful for such person to dispose, by [redacted] or mortgage, of such share, or of any interest therein, and that *every contract* for, or sale or disposal of such share or interest *shall be void*, and that every person entering into such contract shall forfeit a sum not exceeding 10*l*.

The transfer of *shares* after complete registration, is thus provided for by section 54: "It shall be lawful for every shareholder of such company, and he is hereby entitled, to sell and transfer his shares therein by deed duly stamped, in which the full amount of the pecuniary consideration for such sale shall be truly expressed, and which instrument of transfer must be according to the form in the schedule (K) to this act annexed, or to the like effect; and the directors of the company shall cause a memorial of such instrument of transfer, when produced at the office of the company, to be entered in a book to be called 'The Register of Transfers,' and the entry thereof to be endorsed on the instrument of transfer." All calls [*278] are to be paid previous to transfer, and subsequently the transferee is alone liable.

The 9 & 10 Vict. c. 28, facilitates the dissolution of railway companies, but dissolution is not to affect the rights of creditors (s. 25), or the settlement of liabilities.

The original liability of the shareholder to creditors and third parties, for all contracts made up to the time of the registered transfer of his interest, clearly remains. It is governed entirely by the same law as that of retiring partners, which has been already fully explained. Wherever any original shareholder has reason to believe that any credit has been given to the company on his account, or by parties who have a particular knowledge of his connexion with the company, it will be prudent to give such parties express notice of its termination.

This brief outline of the law of public companies, as far as it affects contracts by and with them, will be found to embrace the general principles of the law applied to cases most likely to arise, and of which the solution promises to be of practical or frequent use.

[*279] *LECTURE X.

PRINCIPAL AND AGENT — THEIR RESPECTIVE LIABILITIES — AGENCY OF WIVES FOR THEIR HUSBANDS — RECAPITULATIONS — REMEDIES BY ACTION — STATUTES OF LIMITATION.

PURSUING the consideration of the points arising upon contracts made through the medium of agents, and having disposed of those which relate to the liability of the principal upon them, the next in order is that which regards his power to take advantage of them. Now, where the agent, when he makes the contract, states who his principal is, and states that he is contracting on the behalf of that principal, or where (though there may be no express statement to that effect) the circumstances of the transaction can be shown to have been so completely within the knowledge of the parties to it that there can be no doubt that it was understood at the time that the person who actually made the contract made it as an agent, and intended to make it on behalf of his principal, in such cases there can of course be no doubt of the principal's right to take advantage of it, and enforce it to the fullest extent. It is, in truth, as if he had put his own hand to it. In such cases, therefore, there can [*280] *be no difficulty. But the cases in which difficulties arise, are those in which the agent, being really only the substitute for another, nevertheless contracts in his own name as if he were himself the principal.

Now, in such a case, the principal may adopt and enforce the contract, but his right to do so is subject to a qualification which has been dictated by common sense and public convenience, namely, that, on declar-

ing himself, he stands in the place of the agent who made it, so that the other contracting party enjoys the same rights against him which he would have enjoyed against the agent who made it, had that agent really been the principal. For instance, if I buy a parcel of goods from A., who sells them to me in his own name, though he is really only the factor of B., whose property the goods really are, B. may, if he think proper, declare himself the principal, and require me to pay the price to him, but if the factor owed me money which I could have set off against the price had the factor sued me for it, I have the right of setting it off against B. in like manner, as I might have done against the factor.[1] And the good sense and justice of this is obvious; for it may be exceedingly inconvenient, indeed ruinous to me, to pay in hard cash; and my knowledge that I should have this set-off may have been my only inducement to buy, and if I were deprived of it, I should be led into a trap—induced *to purchase upon one ground, and forced to pay upon a different one. [*281]

[1] George v. Clagget, 7 Term, 359; Purchell v. Salter, 1 Queen's Bench, 197, 41 E. C. L. R.; Sims v. Bond, 5 Barn. & Ald, 393, 27 E. C. L. R.; Lime Rock Bank v. Plimpton, 17 Pick. 159; Leeds v. Marine Ins. Co. 6 Wheaton, 570; Violett v. Powell, 10 B. Monroe, 347; Parker v. Donaldson, 2 Watts & Serg. 21.

As the lecturer has elsewhere expressed it, "in every case in which the agent sues in his own name, two consequences, it must be remembered, follow: 1. That the defendant may avail himself of those defences which would be good as against the agent who is the plaintiff on the record; Gibson v. Winter, 5 B. & Ad. 96; Wilkinson v. Lindo, 8 Mees. & Wels. 83; Bauerman v. Radenius. 2. That he may avail himself of those which would be good as against the principal, for whose use the action is brought; Welstead v. Levy, 1 Mood. & Rob. 138; Megginson v. Harper, 4 Tyr. 94; Rex v. Hardwicke, 11 East. 578; Harrison v. Vallance, 1 Bing. 45; Smith v. Lyon, 3 Campb. 465." Note to Thompson v. Davenport, 2 Smith's Leading Cases, 317.

The general rule that a principal may declare himself, and take advantage of his agent's contract made without naming him, and this qualification of it (to prevent the injustice of which it might otherwise be made the instrument), are both very clearly laid down in the judgment in Simms v. Bond, 5 B. & Adol. 393, 27 E. C. L. R. "It is a well-established rule of law," said the L. C. Justice, delivering the judgment of the court in that case, "that where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it;[1] the defendant in the latter case, being entitled to be placed in the same situation at the time of the disclosure as if the agent had been the contracting party."[2] See further, George v. Clagett, 7 T. R. 359;[3] Carr v. Hinchcliffe, 4 B. & C. 551, 10 E. C. L. R., and Warner v. M'Kay, 1 Mee. & Welsb. 595.

Before leaving this subject, I will say one word with regard to the situation of an agent who contracts in the manner I have just mentioned, without naming his principal. It is settled that in such a case, the other contracting party may, when he discovers the true state of facts, elect to charge either him or his prin-

[1] Unless, indeed, the defendant relied on the plaintiff's character as agent, and would not have contracted with him as principal if he had known him so to be; Schmalz v. Avery, 3 English Law and Equity Reports, 391.

[2] If, however, the defendant either knew, or had the reasonable means of knowing that he was dealing, not with an agent, but with a principal, the latter part of the rule as thus expressed, obviously loses its application; Baring v. Corrie, 2 Barn. & Ad. 137, 22 E. C. L. R.; so, if the purchaser knew that the seller was not the owner of the goods, but a factor—in such case, he can have no set-off against the latter, whether the suit be brought in the name of the principal or in his own name, Parker v. Donaldson, 2 Watts & Serg. 9, for in neither of these cases is the purchaser deceived.

[3] And see the note to that case in 2 Smith's Leading Cases, 161.

cipal, whichever he may think most for his advantage;[1] and that he may do the same where the agent, at the time of making the contract, says that he *has a principal, but declines to say who that principal is.(a) [*282]

But there is this qualification to the right of election, namely, that if the state of accounts between the agent and principal have been altered, so that the principal would be subjected to a loss by the other contracting

(a) The right to sue the principal when disclosed does not apply to bills of exchange accepted or endorsed by the agent in his own name alone, and not *per proc.*, for by the law of merchants, a chose in action is passed by endorsement, and each party who receives the bill is making a contract with the parties upon the face of it, and with no other party whatever. See Beckham v. Drake, 9 M. & W. 92, per Lord Abinger, C. B. [Bank of Hamburg v. Wray, 4 Strobhart, 57.]

[1] Bacon v. Smedley, 3 Strobhart, 542; Perth Amboy Manufacturing Company v. Condit, 1 Zabriskie (N. J.), 659, unless the circumstances attending the contract are such as to show an intention to look solely to the one and not to the other. If the vendor, knowing of the principal, still credits, and looks to the agent as the responsible party, he of course exonerates the principal; Page v. Stone, 10 Metcalf, 160; Jones v. Alton Ins. Co., 14 Connect. 301; Ahrens v. Cobb, 9 Humphreys, 543; Violet v. Powell, 10 B. Monroe, 347; Bate v. Burr, 4 Harrington, 130; and this, whether the latter has or has not received the property; Ahrens v. Cobb. But it is obvious, that the mere fact of charging the goods to the agent, should not raise a presumption that the vendor thereby meant to rely solely on the latter, unless the name, and perhaps also the situation and circumstances of the principal be also known to the vendor, for certainly unless he knew the *name* of the principal, there can be no opportunity of electing between him and the agent; Lapham v. Green, 9 Vermont, 406; Edwards v. Golding, 20 Id. 30; Henderson v. Mayhew, 2 Gill, 393, and it would seem that unless he knew, also, something of his *circumstances*, the case would be the same; Raymond v. The Crown and Eagle Mills, 2 Met. 319; Upton v. Gray, 2 Greenleaf, 374. See the note to Thompson v. Davenport, 2 Smith's Leading Cases (4th ed.), 317, 318.

parties' election, the right of election is in such case lost. Suppose, for instance, I employ A. to purchase goods, and he purchases them from B. in his own name. Now B., when he discovers me to be the real principal, may elect whether he will treat me or my agent as his debtor. But if, in the mean time, I have paid A., he will lose that right, since otherwise I should have to pay the price twice over. Still, this qualification is itself subject to a minor one, namely, that the principal cannot, by prematurely settling with his agent, deprive the other contracting party of his right of election. Suppose, for instance, as in the case I have just put, that I employ A. to purchase goods, but not for ready money, but at three months' credit. A. purchases [*283] in his own *name from B. B., before the three months have elapsed, discovers the true state of affairs, and elects to take me as his debtor. I should not be allowed to say, in this case, "You are too late; I have settled with A., my agent." The answer would be, "You had no occasion to do so pending the time of credit; and you cannot by doing so, deprive B. of his right to elect you as his debtor." You will see all these distinctions laid down in three cases, Paterson v. Gandasequi, 15 East, 62, Thompson v. Davenport, 9 B. & C. 78, 17 E. C. L. R., and Kymer v. Suwercropp, 1 Campb. 109.(*a*)[1]

(*a*) The cases in which an agent is personally liable, and may be sued on the contract he makes, may be thus classed:—

In the first place, he is liable, according to the doctrine in Thompson v. Davenport, where the principal was not disclosed at the time of the contract; but if he were known, and credit were given to *him* at the time, the agent cannot be afterwards sued, provided he acted within the scope of his authority. [Patton v. Brittain, 10 Iredell, 8.]

[1] The student will find these cases, together with Addison v. Gandasequi, 4 Taunt. 573, fully commented upon in 2 Smith's Leading Cases, 294.

*Before leaving the subject of contracts by agents, I will advert to the topic which in a [*284]

In the second place, the agent is liable, as we have already stated, where he exceeds his authority, or represents himself to have an authority which he has not, the want of authority being unknown to the other party; Jones v. Downman, 4 Q. B. 235, 45 E. C. L. R.; [Dusenbury v. Ellis, 3 Johns. Cas. 70; Meech v. Smith, 7 Wendell, 315; Woodes v. Dermett, 9 New Hampshire, 55;] for in such cases the creditor has no remedy against the principal; Wilson v. Barthrop, 2 M. & W. 863.[1] Here again, however, arises a question, as we have seen, how far Smout v. Ilbery (supra) is good law, and that the agent is to be held liable where it cannot be proved that he fraudulently misrepresented his authority. But that case clearly decides another very important point, namely, that where a man has been in the habit of dealing with the plaintiff for household goods, the wife is not liable for such as are supplied to her after his death, but before information of his death had been received, she having had originally full authority to contract, and done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge, relating to it; the revocation itself being by the act of God, and the continuance of the life of the principal being equally within the knowledge of both parties.

In the third place, an agent is liable for himself and his heirs under seal, for the act of the principal, though he describe himself in the deed as covenanting for and on behalf of such other person. Hancock v. Hodgson, 4 Bing. 269, 13 E. C. L. R.; Appleton v. Binks, 5 East, 148.[2]

An agent is liable, in the fourth place, where he contracts in

[1] Hampton v. Speckenagle, 9 Serg. & Rawle, 212, unless, of course, the principal should have subsequently ratified the agent's act; Bragg v. Fessenden, 11 Illinois, 544; Fitzsimmons v. Joslin, 21 Vermont, 199; but such ratification by the principal must be shown to have been made with a full knowledge of the facts, and an understanding that he would not be liable unless he did so ratify; Fletcher v. Dysant, 9 B. Monroe, 413.

[2] Burrell v. Jones, 3 Barn. & Ald. 47; Sumner v. Williams, 8 Mass. 162; Belden v. Seymour, 8 Connect. 24; White v. Dewey, 15 Pick. 433; Donohue v. Emory, 9 Metcalf, 66; Mason v. Caldwell, 5 Gilman, 196. It has, however, been held, in a few cases, that where

former lecture I reserved for this period; that, namely, of a wife's power to bind her husband by contract. Now it is a principle as old as the time of Fitzherbert[1]

writing in his own name,[2] unless it appear on the face of the contract that he did so only as an agent;[3] otherwise he will not be allowed to give parol proof that he contracted as agent so as to relieve himself from responsibility. But parol evidence may nevertheless be given to charge an unknown principal, as it does not deny that the contract is binding on those whom, on the face of it, it purports to bind, but shows that it also binds another by reason that the act of the agent in signing the agreement in pursuance of his authority is, in law, the act of the principal; Higgins v. Senior, 8 M. & W. 844, per Parke, B. See also Jones v. Littledale, 1 N. & P. 697, 36 E. C. L. R.; Magee v. Atkinson, 2 M. & W. 440.

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a person expressly covenants in his representative capacity, "and not otherwise," he will not be personally liable, as no false confidence of security is excited on the part of the purchaser; Thayer v. Wendell, 1 Gallison, 16, per Story, J.; Day v. Browne, 2 Hammond, 347; Manafer v. Morrison, 1 Dana, 208, 6 Alabama, 77.

[1] Fitzherbert Nat. Brev. 120, G. "A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority to his bailiff or servant to buy and sell for him, and so for the contract of his wife, if he giveth authority to his wife, otherwise not."

[2] Burrell v. Jones, 3 Barn. & Cress. 160; Hopkins v. Mehaffey, 11 Serg. & Rawle, 129; Kirkpatrick v. Stainer, 22 Wend. 244; Taintor v. Prendergrast, 3 Hill, 72; Simonds v. Heard, 22 Pick. 121.

[3] In Higgins v. Senior, the point actually decided, was that a defendant could not shift a liability from his own shoulders to that of another, by showing that a contract which purported to be signed on his own account, was, in reality, signed as agent for another; and the same has been held in this country, even in cases where the party signed as agent, but not naming the principal; Pentz v. Stanton, 10 Wend. 277; Stackpole v. Arnold, 11 Mass. 27; Alfridson v. Ledd, 12 Id. 175; Bradlee v. Glass Co. 16 Pick. 347. But in Higgins v. Senior, it was further suggested, as had also been done in Jones v. Littledale, that a distinction existed between evidence to discharge a defendant, and evidence to charge an additional party; as, in the latter case, the evidence would not contradict the written instrument, but only show that it bound another party.

that, wherever a wife's contract made during marriage binds the husband, it is on the ground that she entered into it as his agent. Now that she may be appointed his *agent in the same way that any other individual may, either by express words, or by implication, I have already mentioned; and you will find that illustrated by the late case of M'George v. Egan, 5 Bing. New Cas. 196, 35 E. C. L. R. I am not, however, now speaking of that sort of agency which is purely conventional, and in no way depends on the relation of husband to wife, inasmuch as it may be conferred on any one else; but of another and a peculiar sort of agency, which is implied from the circumstance of two persons living together as man and wife, from which circumstance a presumption arises that the wife has authority to bind the husband by her contracts for necessaries suitable to his fortune and rank in life.[1] This is very clearly explained by Lord Holt, in Ethrington v. Parot, L. Raym. 1006; Waithman v. Wakefield, 1 Camp. 120. But then this must be taken subject to two observations: first, that the contract must be for *necessaries;* secondly, that the party making it must not have been forbidden to trust her. [*285]

Now, with regard to the question what are neces-

[1] This agency (the existence of which is a question for the jury, Lane v. Ironmonger, 13 Mees. & Welsb. 368; Casteel v. Casteel, 8 Blackford, 240), is, however, so far as necessaries are concerned, to be presumed from the mere fact of cohabitation; M'Cutcheon v. M'Gahey, 11 Johnson, 281; Fredd v. Eves, 4 Harrington, 385; Connerat v. Goldsmith, 6 Georgia, 14; Henderson v. Stringer, 2 Dana, 292; so much so, that it matters not whether the woman be really the wife of the man sought to be charged, or only appear so to be, if he allow her to live with him and pass for his wife; Watson v. Threlkeld, 2 Esp. 637; Blades v. Free, 9 Barn. & Cress. 167, 17 E. C. L. R.

saries, it is a question which always and obviously depends upon the circumstances of the particular case under discussion for the time being. It is one which is continually arising, and of which there are many reported examples (see Hunt v. De Blaquiere, 5 Bing. 550, 15 E. C. L. R.; Clifford v. Layton, M. & M. 101, 22 E. C. L. R.), but the cases most frequently referred [*286] to on the subject are *Montague v. Benedict, 3 B. & C. 631, 9 E. C. L. R.; and Seaton v. Benedict, 5 Bingh. 28, 15 E. C. L. R. The name of the defendant probably strikes you as fictitious, and in truth it is so, being taken from a play of Shakspeare called *Much ado about Nothing*, in which one of the characters is a young officer named Benedict, who protests vehemently against marriage. The real defendant was a highly respectable professional gentleman, and it was sought in Seaton v. Benedict to charge him with a bill contracted by the lady for articles of millinery of a very expensive description.[1] It appeared at the trial that she was already supplied with all necessary articles of dress; and the Court held, on a motion for a new trial, that the defendant was in point of law entitled to a verdict.

In the other case of Montague v. Benedict, the goods supplied were articles of jewellery to the amount of 83*l.*, which had been delivered in the course of two months. The plaintiff's evidence was, that the defendant lived in a furnished house of which the rent was 200*l.* a-year, and that the lady had a fortune of 4000*l.*; the defendant's, that the lady was already

[1] So in Lane v. Ironmonger, 13 Mees. & Wels. 368, where the plaintiff's bill for bonnets and lace amounted to over £5000 for part only of a single year, and the extravagance of the bill was held to be a proper element to be considered by the jury upon the question of the husband's permission and authority having been given.

supplied with sufficient jewellery. The jury found a verdict for the plaintiff; but the Court set it aside, on the ground that there was no evidence to support it. Mr. J. Bayley said,—

"If the husband and wife live together, and the husband will not supply her with necessaries, or the means of obtaining them, then, although she has her remedy in the *Ecclesiastical Court, yet she is at liberty to pledge the credit of her husband for [*287] what is strictly necessary to her own support. But, whenever the husband and wife are living together, and he provides her with necessaries, the husband is not bound by contracts of the wife, except where there is reasonable evidence to show that the wife has made the contract with his assent. Cohabitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence;[1] and when such assent is proved, the wife is the agent of the husband duly authorized."(a)

These observations of Mr. J. Bayley support the latter of the two observations to which I adverted,

(a) The agent's authority is determinable either by revocation, by the discharge of his particular functions, or by the death of his principal, as in the case of Smout v. Ilbery, where the creditor was rendered remediless, as against the agent (for the principal was known), and also against his successor; though Pothier says:— "Although the commission terminates by the death of the person giving it, and there appears a repugnancy in supposing me to contract by the ministry of another, who after my death contracts in my name; yet if he contracts in my name after my death, but before it could be known at the place where the contract is made, such contract shall oblige my successor as if I had actually contracted by the ministry of the agent." Upon which, Evans thus comments:— "I do not think this decision would be admitted by the courts in *England*. If the contract is enforced it must be either as the act of the party deceased, or of his executor. The first supposition is absurd, and the other imputes to the executor an assent which he has not given, and which, if he does give, induces a personal obligation against himself."

[1] As, for instance, by showing that the tradesman gave credit to the wife herself; Connerat v. Goldsmith, 6 Georgia, 14.

namely, that the contract must not only be for necessaries suitable to the husband's fortune and degree, [*288] but that the person making it *must not have been forbidden to contract with the wife on his account.

This point, indeed, had been decided long before by the majority of the judges in the Exchequer Chamber in a case of Manby v. Scott, 1 Lev. 4, 1 Siderfin, 109. The discussions in this case were exceedingly long and elaborate; and, as frequently happens in the old reports, the reasons given in some instances almost ludicrous: for instance, Mr. Justice Twisden, who was at first of opinion that it was not in the husband's power to prohibit another from trusting his wife for necessaries, gave as a reason that, if he might prohibit one person, he might go on doing so, till he had at last prohibited every one in England; and then, says he, if he were to join the king's enemies, his wife must go too, and then she would be hanged; or stay at home, and then she would be starved, which he remarked would be inconvenient. However, the majority of the Court were of opinion, that the husband may prohibit a particular person from trusting his wife even for necessaries, and that, if he trust her in defiance of that prohibition, he cannot hold the husband liable.[1]

[1] It must not, however, be supposed that a husband will not be liable for necessaries furnished the wife, when he, without fault on her part, refuses to supply her with them, even although he may have given notice not to trust her. It is only when he himself supplies her with necessaries that a notice will be effected to protect her; Rotch v. Miles, 2 Connect. 638; Kimball v. Keyes, 11 Wendell, 33; Emery v. Neighbor, 2 Halsted, 142; Billing v. Pitcher, 7 B. Monroe, 458; Fredd v. Eves, 4 Harrington, 385; and it would seem that in any case notice by newspaper is insufficient, unless it was proved to have reached the party who supplied the articles; Fredd v. Eves. In such cases as these the husband is liable without

The points which we have been hitherto considering all arise in cases in which the husband and wife continue to live together. But if the wife, when she makes the contract, is living separated from her husband, the case is quite different; and the only question is, whether the *separation is with the husband's assent, or produced by the husband's misconduct. [*289] If the husband drive his wife from home, or if he so misconduct himself that it is morally impossible and unreasonable that she should continue to reside in his house, he sends her into the world with authority to pledge his credit for her necessary expenses. And this authority he cannot revoke or control by any notice or prohibition whatever. "If a man," said Lord Eldon, in Rawlyns v. Vandyke, 3 Esp. 251, "will not receive his wife into his house, or turns her out of doors, he sends her with credit for her reasonable expenses."—"Where a wife's situation in her husband's house," says Lord Kenyon, in Hodges v. Hodges, 1 Esp. 441, "is rendered unsafe, from his cruelty and ill-treatment, I shall rule it to be equivalent to his turning her out of the house, and that the husband shall be liable for necessaries furnished to her under those circumstances." See Houliston v. Smyth, 3 Bing. 127, 11 E. C. L. R.; Boulton v. Prentice, Str. 1214.[1]

his assent, and hence his liability necessarily rests on other grounds than those springing from the law of principal and agent, as is clearly shown in the American note to Manby v. Scott, 2 Smith's Lead. Cases, 378.

[1] See also Sykes v. Halstead, 1 Sandford's S. C. R. 483; Rutherford v. Coxe, 11 Missouri, 347; Evans v. Fisher, 5 Gilman, 569; Fredd v. Eves, 4 Harrington, 385; Pidgin v. Cram, 8 N. Hamp. 350; Clement v. Mattison, 3 Richardson, 93. And it is not necessary that actual bodily cruelty should be used to her, as it has been held (overruling Harwood v. Heffer, 3 Taunton, 421) that if a husband, by bringing another woman to live under his roof as his mistress, thereby

In like manner, if the husband and wife mutually consent to live apart, she has a right to bind him by contracting for her reasonable and necessary expenses as long as the consent continues;[1] Hodgkinson v. Fletcher, 4 Camp. 70; Nurse v. Craig, 5 Bos. & Pull. 148. But in those cases in which the wife, living apart from her husband, has authority to bind him by [*290] contracts for *necessaries, if he allow and pay her a sufficient maintenance the authority is gone, and her contracts, even for necessaries, will not bind him; the reason of which is, that the authority is given by law for the wife's protection, to save her from distress occasioned by her husband's misconduct; but if he make her a proper allowance, and pay it, there is no such danger; and then *cessante ratione cessat lex*;[2] see Mizen v. Peck, 3 Mee. & Welsb. 481, which is the last case on his subject, and in which the Exchequer decided that it makes no difference that the tradesman, when he trusts the wife, has no notice that her husband makes her an adequate allowance.[3]

Thus you see that if the wife be driven from home

renders his house unfit for the residence of his wife, he is bound to provide her with necessaries during the separation; Aldis v. Chapman, T. T. 50 Geo. 3, cited 1 Selwyn's N. P. 272; Houliston v. Smyth, 3 Bing. 127, 11 E. C. L. R.; Blowers v. Sturdevant, 4 Denio, 49. As in the case of an infant, however, the husband is not liable for money lent to enable her to procure necessaries, Walker v. Simpson, 7 Watts & Serg. 88.

[1] And not only for necessaries furnished to herself, but to the children of the marriage, if he suffer them to remain with her; Rumney v. Keyes, 7 N. Hamp. 571; Kimball v. Keyes, 11 Wend. 33.

Cany v. Patton, 2 Ashmead, 140; Baker v. Barney, 8 Johns. 72; Fenner v. Lewis, 10 Id. 38; Mott v. Comstock, 8 Wendell, 544; Kimball v. Keyes, 11 Id. 33.

[3] The same point had been so previously decided in this country in Cany v. Patton, 2 Ashmead, 140.

by the husband's misconduct, or if they separate by mutual consent, she carries with her an implied authority to pledge his credit, so long as that separation continues, unless he pay her an allowance adequate to *her* support and *his* own means. But, when the separation is occasioned neither by his misconduct nor consent, the case is otherwise. In such case she has no authority at all to pledge her husband's credit, and the person who contracts with her does so at his peril.[1] See Hardie v. Grant, 8 C. & P. 512, 34 E. C. L. R.; Morris v. Martin, Str. 647. And, where a married woman is found living apart from her husband, the *primâ facie* presumption is that it is neither in consequence of his improper conduct or by his assent, and therefore, it always *lies on the person who gave her credit to show what were [*291]

[1] And it is immaterial whether he does or does not know of the wife's having left her husband; Hunter v. Boucher, 3 Pick. 289; M'Cutchen v. M'Gahay, 11 Johns. 281; Walker v. Simpson, 7 Watts & Serg. 88; Evans v. Fisher, 5 Gilman, 569. The rule admits of no exception, of course, in the case of necessaries; Williams v. Prince, 3 Strobhart, 490. And even if the husband and wife have separated by mutual consent, and the wife goes to live in the house of a third person, with whom the husband makes a contract to support her, if she leave the house of that person voluntarily and without just cause, she will carry with her no authority to pledge his credit for her support, though if she were driven from that house by improper usage it would be different; Pidgin v. Cram, 9 N. Hampshire, 350. In case, however, the wife should return to her husband, or even should in good faith offer to return to him (and the question of such good faith is one upon the evidence for the jury, Cunningham v. Irwin, 7 Serg. & Rawle, 259), his liability is revived from the time of such return or offer; Harris v. Morris, 4 Esp. 42; M'Gahay v. Williams, 12 Johnson, 293; Henderson v. Stringer, 2 Dana, 292; Rennick v. Ficklin, 3 B. Monroe, 166; Cunningham v. Irwin, supra; Blowers v. Sturdevant, 4 Denio, 45. The husband is not, however, liable for anything furnished to the wife during the interval between her leaving him, and her return; Williams v. Prince, 3 Strobhart, 490.

the circumstances under which they separated. See Reed v. Moore, 5 C. & P. 200, 24 E. C. L. R.; Mainwaring v. Leslie, M. & M. 18, 22 E. C. L. R.

It only remains to observe that where the wife, in consequence of the circumstances under which she separated from her husband, has authority to bind him by contract, those contracts must be for necessaries suitable to his rank and means. What *are* such necessaries, is a question which of course turns on the particular circumstances of each case (see Hunt v. De Blaquiere, Ewers v. Hutton, 3 Esp. 255). There are two of the latest cases involving rather singular questions, Turner v. Rookes, 10 A. & E. 47, 37 E. C. L. R., and Grindell v. Godmond, 5 A. & E. 755, 31 E. C. L. R. In Turner v. Rookes, the husband and wife were living separate by consent, under a deed of separation, by which she had a separate maintenance of 112*l.* a year; so that as long as that was paid she would have no authority to bind the husband for necessaries of an ordinary description; but it appeared that the husband had used threats of violence towards her, which occasioned her so much alarm that she thought it necessary to exhibit articles of the peace against him. In order to do this, she was obliged to employ an attorney, and not being able to pay his bill of costs, he brought his action to recover it against the husband. The Court held that the proceeding was [*292] necessary for the wife's safety, and *therefore that she had a right to bind the husband by contracting for it, and that though the maintenance allowed her might be sufficient for ordinary purposes, yet that this was an extraordinary contingency not likely to have been contemplated in arranging the amount of maintenance, and which therefore was not covered by it; and they held the husband liable as

having, through his wife, employed the attorney to exhibit articles of peace against himself.

The other case was one in which the husband had assaulted and ill-treated his wife, who preferred an indictment against him at the Beverley sessions. Upon which he was convicted, and sentenced to twelve months' imprisonment, and a fine of 50*l.*; the attorney who conducted the prosecution thinking, very correctly, that if he carried it on without funds, he would have no remedy against any one, required money in hand, which the lady borrowed from her brother, and he brought an action against the husband to be reimbursed. But the Court thought that though it might be necessary that she should exhibit articles of peace for her own personal security, yet that it could not be necessary that she should assume the offensive, and prefer an indictment against him, and consequently that the plaintiff was not entitled to recover.(*a*)

*The whole of the branch of the law may be shortly summed up thus:—while a wife continues to live with her husband, the presumption is that she has authority to bind him by contracting for neces- [*293]

(*a*) What are necessary things for a wife is a question which, as well as the analogous one of what are necessary things for an infant, have often been the occasion of doubt and litigation. In Peters v. Flemyng, 6 M. & W. 42, Rolfe, B., says:—"I think the explanation given by my brother Alderson is the best that can be given; viz., that that is necessary which is *bonâ fide* purchased for use and not for ornament, and which consorts with the condition and rank in life in which the party moves." And Alderson, B., in the course of the argument in the same case says:—"The term 'necessaries,' as applied to dress, may mean those things without which the party would lose caste in society; and he lays down the true test as being whether the articles were obtained for *real use*, being also suitable to the condition and degree of an infant." In Chapple v. Cooper, as we have already seen, this point was incidentally discussed. (See page 206, n.)

saries. But that presumption is subject to be rebutted. When she is living separately from him, the presumption is that she has no authority; but that presumption also is subject to be rebutted by showing that the separation was by consent, or occasioned by the husband's misconduct; in which cases, if he leave her without adequate funds for her support, she has a right to pledge his credit by contracting for necessaries.(*a*)

(*a*) The contracts upon which assignees of bankrupts and personal representatives of deceased persons are liable, are governed by the general law of contracts, and the peculiarities which attend them belong to the laws regulating their functions, and are not properly within the province of a work on contracts. It is sufficient, therefore, to remark briefly that no action will lie in the name of a bankrupt, as the Bankrupt Act vests in the assignees absolutely all contracts, whether executed or executory, made by him and in which he was beneficially interested at the time of the fiat. These contracts being actually vested in the assignees, actions *ex contractu* must not be brought in the bankrupt's name, even with the consent of the assignees, but in that of the assignees themselves, for if brought in the name of the bankrupt, the defendant may plead the bankruptcy in bar of the plaintiff. The assignees have the power of enforcing a contract broken subsequently to the bankruptcy, but entered into by the bankrupt before the bankruptcy, and also of suing for work done by the bankrupt for them subsequently; Whitmore v. Gilmour, 12 M. & W. 808. It is unnecessary that they should give notice of their intention of adopting this contract, being only obliged to perform the conditions precedent, which the bankrupt himself must have done; Gibson v. Carruthers, 8 M. & W. 321. The assignees have only contracts and property vested in them, in which the bankrupt was beneficially interested at the time of the fiat; therefore any property of which the bankrupt was only a trustee, and in which, at the time, he had no such interest, would not pass, he not being the reputed owner of it, and any action appertaining to such property must not be brought in the name of the assignees, they having no interest in it, but in that of the bankrupt; otherwise, where the bankrupt had any such interest at the time of the fiat. The bankrupt may sue in his own name on causes of action *ex contractu* accruing to him between the issuing of the fiat and the grant of the certificate, where he acquires any property or enters into any contract, unless the assignees

*I have gone through the subject which I proposed at the commencement of these lectures [*294]

interfere, the bankrupt's title being good against every one but the assignees, as such causes of action and property are not vested absolutely in the assignees, unless they claim them. After the creditors have been paid in full, the bankrupt has a right to and may sue for all debts which remain. Assignees are not compelled to sue as assignees, upon any contracts made by them which relate to the estate of the bankrupt, after the bankruptcy, but they have the power of suing thereon as assignees if they choose.

All debts and claims against the bankrupt are barred by the certificate, whether proved or such as might have been proved under the fiat, and so are any consequential damages arising from the non-payment thereof. Unliquidated damages not ascertained at the time of the fiat cannot be proved, even though they be founded on a contract.

Executors or administrators are liable to be sued upon the contracts of the testator to the extent of the assets in their hands (see 3 & 4 W. 4, c. 42, s. 14); and they may sue and be sued in their representative capacity alike on personal contracts, and for injuries done to the real estate of the testator. But the representative is never personally liable unless he has rendered himself so by some note in writing under the Statute of Frauds, as we have seen under that head. It is also requisite that there should be a valid consideration for such promise, as in all other contracts. (See ante, p. 88, et seq.) The liability of the executor *de bonis propriis* has been much discussed in the cases where he is sued for rent, accruing during his own time in his representative character, and likewise in his individual capacity as assignee of the term. (See Rubery v. Stevens, 4 B. & Ad. 241, 24 E. C. L. R., and 1 Wms. Saund. 111 a, note c, where the cases are cited and the law explained.)

The cases in which an executor incurs a personal liability on contracts made by him in that capacity, are cited and reviewed, Comer v. Shawe, 3 M. & W. 355. See also Waite v. Gale, 14 Law Journ. Q. B. 212.

It is an established rule, that the executor or administrator may sue wherever the money to be recovered will be assets, whether as contracts accruing in the testator's lifetime, or made by them, Heath v. Shelton, 22 M. & W. 632, such as the representatives entered into in completing the testator's contracts, or for money paid by him as executor, or on an account stated by him, or for goods sold by him

[*295] *with the exception of the last point. I have mentioned the different sorts of contracts, the [*296] *peculiarities of those by record, by writing sealed and delivered, and writing not under seal; of the consideration which a simple contract requires to support it; of the effect of illegality whether by common or statute law, in invalidating contracts; of the competency of the parties, and of the rules which govern contracts entered into by those parties through the medium of agents.

It remains to point out, in a few words, the *remedies* by which the observance of contracts may be enforced, and their non-observance punished. Now I say nothing about the remedy in Courts of Equity. *There* a specific performance may, as you know, in many cases be compelled; there is no such thing as a specific performance to be had in a court of law, except in the cases to which the writ of mandamus is applicable, [*297] which can, however, never be *obtained when there is any other remedy. The remedy in a court of law for breach of contract is by *action*, and there are distinct forms of action applicable to the breach of distinct species of contract.

If the contract be by record, the remedy is by writ of *scire facias*, which lies only upon a record, and which has obtained its name from the Latin words it formerly contained, commanding the sheriff to make the defendant know that the court commanded his

or for the testator since his death, if the contract is ratified by his personal representative, and this is equally so when an administrator is not in office till after the debt is incurred by some third party, for when one means to act as agent for another, a subsequent ratification is equivalent to a prior command; nor is it any objection that the intended principal was unknown to the person who intended to be the agent. (Foster v. Bates, 12 M. & W. 226; see also Ricketts v. Weaver, 12 M. & W. 718.)

appearance to answer why execution should not issue against him.(*a*)

If the record create a debt, render a sum certain payable by the one party to the other, an action of debt will lie to enforce payment, if the plaintiff prefer the form of proceeding to a *scire facias*.

The action of debt lies in every case where there is a liquidated pecuniary duty from one *person to another,(*b*) and it is frequently found an [*298]

(*a*) It is used for a variety of purposes, but perhaps one of the most common to which it is applied, is to revive a judgment after it has become extinct; for all writs of execution must be sued out within a year and a day after the judgment is entered, otherwise the court concludes *primâ facie* that the judgment is satisfied and extinct, yet, however, it will grant this writ of *scire facias*, which states the judgment recovered by the plaintiff, and that execution still remains to be had, and commands the sheriff to *make known* to the defendant, that he be in court at the return day, in order to show why the plaintiff ought not to have execution against him. See Holthouse's Law Dictionary, 2d edition, 363.

(*b*) That is to say, for a sum definite, or debt *eo nomine* and *in numero*. Thus it lies on an award for the money awarded (see 2 Wms. Saund. 62 b, note 5); for calls of shares upon bills between the immediate parties, as, for instance, between endorsee and his endorser, but not between endorsee and acceptor, or endorsee and a distant endorser, or between endorser and drawer, for in such case there is no privity of contract. (Lewin v. Edwards, 9 M. & W. 720.) Neither will it lie on notes payable by instalments until all are due, though assumpsit will. (2 Wms. Saund. 303 a, note 9.)

Debt lies on all the common counts; such as goods sold, work and labour, money lent for use and occupation, &c., even though there is an express demise if there be no deed, and for interest of money, without alleging any special contract. (1 Wms. Saunders, 201, note a.)

It lies on specialties to recover a money demand secured thereon; such as demises by deed for rent, money bonds, policies of insurance, mortgage deeds, &c.; and also where no money payment is secured by the mortgage, if there be a parol contract to which the security is collateral. (Yates v. Aston, 4 Q. B. 182, 45 E. C. L. R. See also

extremely useful form of action; for suppose A. have three separate demands against B., one *on a [*299] judgment, one upon a bond, and one upon a promissory note. If it were not for this peculiarity of the action of debt, he would be obliged to sue for these demands in three distinct actions, whereas he may unite them all in a single action of debt.

If the contract be by deed, the remedy is by action of covenant, which lies to enforce a contract by deed, and to enforce that only unless the contract be for payment of a liquidated sum, in which case, as I have already said, the plaintiff may, if he prefer it, maintain an action of debt. If the contract be neither by record nor by deed,—if, in other words, it be a simple contract either reduced to writing, or by mere words without writing,—the remedy, unless it be for payment of money, in which case debt also will lie, is by an action of *assumpsit*, or as it is now more often perhaps called, an action on promises.(a) This was originally

Baber v. Harris, 9 A. & E. 532, 36 E. C. L. R.) It lies also on all unsatisfied judgments, whether of superior or of inferior courts, even if not of record. (Jones v. Jones, 5 M. & W. 523;) and of county courts; Williams v. Jones, 13 M. & W. 628; and on those of foreign courts and Scotch decrees, where a specific sum is recovered. See Robinson v. Bland, per Lord Mansfield, 2 Burr. 1077, and Russell v. Smyth, 9 M. & W. 810. And debt lies for all penalties given of sums made recoverable by statute, unless otherwise directed.

This action is brought to recover the specific debt due, and not for damages, except for those fictitiously arising from the detention of the debt.

(a) Assumpsit lies in very many cases concurrently with debt, and is brought both upon express promises and in all cases where the law implies a promise from an obligation; *damages* for the breach of which are the sole object of this action. Assumpsit, therefore, lies on all the common counts concurrently with debt, and upon every kind of simple contract, express or implied, but on no specialty.

a sort of action *of trespass upon case, and was called *assumpsit* from the words "undertook and [*300]

It lies, however, on bills of exchange, promissory notes, for rent, or parol demises, but not for rent on leases by deed. Agreements for a deed may, before the deed is executed, form the subject of an action of assumpsit, but not where the agreement is merged in a deed subsequently executed; Filmer v. Burby, 2 M. & Gr. 529, 40 E. C. L. R. Assumpsit lies also against a sheriff to recover money received under a *fieri facias*. So physicians and counsel may maintain it to recover fees expressly promised: and it lies against a factor or an agent refusing to account, and in all merchants' accounts for the balance due, however numerous the items. It lies also for breach of contract, not under seal, by the vendor and vendee, on the sale of real property, or for the non-delivery of goods and chattels sold, or for the non-performance of any contract. It is the only remedy for breach of warranty. It lies also in case of mismanagement of farms, and generally for all acts of nonfeasance.

It is often a question in cases of tortious breach of contract, whether to bring an action of assumpsit for the breach of promise, or an action upon the case for the tort.[1] It has been laid down, that wherever the cause of action is such that it can best be explained by circumstantial declaration, the action should be in case rather than in assumpsit, as it affords better means of doing this. In more recent cases this distinction seems to have been disregarded; and it has been held that actions of this kind may be brought indifferently in case or assumpsit. In Boorman v. Brown, 11 Cl. & Fin. 1 (where a broker had delivered goods on sale without payment, against the instruction given him), the judgment of the Exchequer Chamber (3

[1] That a plaintiff may waive the tort and bring assumpsit, has long been settled; Hussey v. Fiddell, 12 Modern, 324; Smith v. Hodson, 4 Term, 211; Taylor v. Plumer, 3 Mau. & Selw. 562; Powell v. Reese, 7 Ad. & Ell. 426, 34 E. C. L. R.; M'Cullough v. M'Cullough, 2 Harris, 295. But where he does so, it is obvious that the defendant is admitted to any set-off to which he may be entitled, as a plaintiff cannot affirm a contract for the purpose of a recovery, without giving to the other party all the rights flowing to him from such an affirmance; Smith v. Hodson, supra, and see the notes to that case in 2 Smith's Lead. Cas. 167; Lights v. Clouston, 1 Taunton, 114; Bank U. S. v. Macalester, 9 Barr, 479; Jones v. Hoar, 5 Pick. 285.

[*301] promised," which *always appeared in the declaration. When the uniformity of process act

Q. B. 511, 43 E. C. L. R.) was upheld, and in which Tindal, C. J. said, "There is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render: actions against common carriers, against ship-owners on the bills of lading, against bailees of different descriptions; and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff: and, as to the objection that this election is only given where the plaintiff sues for a misfeasance, and not for a nonfeasance, it may be answered, that in many cases it is extremely difficult to distinguish a mere nonfeasance from a misfeasance; as in the particular case now before us, where the contract stated in the declaration on the part of the broker is, in substance, to deliver the goods of the plaintiffs to the purchaser on payment of the price in ready money, and where, if the broker delivers without receiving the price, the breach of his direct undertaking is as much a wrongful act done by him, that is a misfeasance, as it is a nonfeasance, the distinction between the two being, in that case, very fine and scarcely perceptible. But, further, the action of case upon tort very frequently occurs where there is a simple nonperformance of the contract, as in the ordinary instance of case against ship-owners, simply for not safely and securely delivering goods according to their bill of lading; and as in the case of Coggs v. Bernard, 2 Ld. Raym. 909, where an undertaking is stated in the declaration as the ground of action; and to give no further instance, the case of Marzetti v. Williams, 1 B. & Ad. 415, where the decision, that the plaintiff was entitled to nominal damages without proof of any actual damage, rests entirely on the consideration that the action, an action on the case, was founded on a contract, not on a general duty implied by law. The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort."[1]

[1] It was, however, correctly said, *arg.*, in the recent case of Courtenay v. Earle, 1 Eng. Law & Eq. R. 337, that "a line must be

was passed, the *schedule contained a form of writ in which it was described as an action on promises; in consequence of this it has ceased to be considered a species of the action of trespass on the case, and indeed it would now be improper to describe it as such; it is now most properly denominated *an action on promises*, and is the great remedy upon the breach of simple contract. [*302]

There is, besides, a sort of action called an *account*,

In the case of Russell v. Bell, 10 M. & W. 340, after a bankruptcy, 85 bundles of yarn, of the value of 114*l.*, were delivered by the bankrupt to the defendants, as they alleged, to meet an accommodation bill which they were about to give the bankrupt. The goods were accompanied by an invoice, which stated them to be *bought* by the defendants of the bankrupt, and it was held that where a man gets hold of goods without any actual contract, the law allows the owner to bring assumpsit. "Here," says Lord Abinger, "the bankrupt is selling goods under false colours, in order to cover transactions he knew he could not otherwise cover, and has no right to set up his own fraudulent contract. But the action being brought for goods sold and delivered by the assignees, and not by the bankrupt, the assignees have a right to waive the tort, and bring an action of assumpsit for goods sold and delivered."[1]

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drawn somewhere, for it is clear that a count for goods sold and a count for slander cannot be joined," and in that case it was held that where a count for trover was joined with counts setting forth certain promises of the defendant not connected with any common law duty arising from the relation between plaintiff and defendant, and alleging a breach in the non-performance of these promises, the declaration was bad for misjoinder.

[1] It is believed to be not quite correct, that in every case in which a man tortiously gets hold of property of another, the latter may waive the tort and bring assumpsit, as it seems to be generally settled that unless the property has been *sold*, or is, in some shape, in money or its equivalent, assumpsit will not lie; Willet v. Willet, 3 Watts, 277; Jones v. Hoar, 5 Pick. 285; Gilmore v. Wilbur, 12 Pick. 120; Allen v. Ford, 19 Pick. 217; Stearns v. Dillingham, 22 Vermont, 624.

which was for a long time almost completely obsolete and disused, but within the last few months has risen again into some little importance in consequence of a decision of the Court of Exchequer, which I will presently mention.(*a*)

[*303] *Now, these being the remedies by which contracts are enforced in courts of law, the next question(*b*) is, as to the *time* within which those reme-

(*a*) The case here alluded to is that of Inglis v. Haigh, 8 M. & W. 769. See post, p. 315. There must be either a privity in deed by the consent of the party, or a privity in law, as in the case of a guardian, in order to maintain an action of account. By statute 4 Ann, c. 16, s. 27, an action of account may be maintained by one joint-tenant, or tenant in common, his executors or administrators, against the other, as bailiff, for receiving more than his share or proportion; and against the executors or administrators of such joint-tenant or tenant in common. It is broadly laid down in Selwyn's Nisi Prius, vol. i. p. 3, that where there is a running account between a merchant and broker, the proper remedy for recovering the balance is by an action of account, not of assumpsit; "but this is not so; an action of account resembles a bill in equity for enforcing the execution of a trust. The first judgment is, that the defendant do account, which is commonly called a judgment *quod computet*; whereupon, the defendant offering to account, the court assigns auditors to take and declare the accounts between the parties; and then the final judgment is that the plaintiff do recover against the defendant so much as the latter is found to be in arrear." Neither in Selwyn nor in Buller is there a reference to any case where this action has been held to lie as between merchant and merchant. (Cottam v. Partridge, 4 M. & Gr. 271, 43 E. C. L. R.)

This action neither lies against infants nor one executor against another. The first judgment, *quod computet*, is interlocutory, and not definite: the defendant then usually offers to account, and the court assigns auditors, who are usually prothonotaries. (See Godfrey v. Saunders, C. B., 3 Wils. 73.) The final judgment is that the plaintiff do recover against the defendant so much as he, the defendant, is found in arrear. A writ of error lies upon this last judgment only.

(*b*) The remedies on each class of contract will be further noticed in treating of the subject-matter of contracts. (See APPENDIX.)

dies are to be pursued; and those times depend upon the provisions of the acts of parliament which we call *Statutes of Limitation.*

*The policy of the legislature in enacting such statutes, and thereby constituting a time after the lapse of which engagements shall be no longer capable of being enforced, has always been considered unexceptionable.[1] [*304]

When you find a debt or an engagement existing after the lapse of a long period of time, it is possible, indeed, that strict justice may require its enforcement, but it is also possible that great injustice may be done by enforcing it. Suppose, for instance, an executor finds a bond forty years old in his testator's repository; it may be that the principal and interest are due and unpaid, but it may also be that they have been paid, or that great part has been paid, and that the vouchers have been lost; or it may be that the bond was deposited with the testator as a collateral security, and that no liability ever in reality accrued upon it, but that the obligee forgot to reclaim it or died pending the suretyship, leaving his representatives in ignorance of the transaction. It may be quite impossible after the lapse of forty years to prove this. Indeed it may be in the knowledge of no person living. Now there would be the greatest hardship in calling upon a man after the lapse of an indefinite space of time to defend himself against such a demand, but there is no great hardship imposed on the obligee by requiring him to enforce his claim within a reasonable time if he intend to enforce it at all.

[1] It may, however, be remarked that the earlier cases, on both sides of the Atlantic, showed a much greater facility in giving effect to acknowledgments whereby to take the case out of the statute, than has been recently the case. Indeed it has been often said that the older cases looked at the statute "with great disfavor."

This, then, is the policy of the Statutes of Limitation—to *prevent obsolete claims from being [*305] raked up. And now as to the time which the legislature has appointed for the purpose of pursuing the several remedies of which I have spoken.[1]

With regard to *scire facias*, there was, for a long while, no limitation imposed by statute to the commencement of that proceeding; but now, by 3 & 4 W. 4, cap. 42, sect. 3, a *scire facias* on a recognisance must be sued out within twenty years.(*a*)

An action of debt founded upon a contract made by deed was also not till very lately subject to any limitation in respect of the time within which it might be commenced: not that you are to suppose that there was *practically* no security against an obsolete claim founded on a deed, for the courts had introduced a presumption that such claims were satisfied after the lapse of twenty years; and if no evidence of any acknowledgment of the existence of the claim appeared to have taken place at that time, they recommended the jury to presume payment or a release, as the nature of the case happened to require; but there was no statute which could be pleaded in bar of such action until the *3 & 4 W. 4, c. 52, the third section of which [*306] established the limitation of twenty years.(*b*)

(*a*) Where an old judgment exists, a *scire facias* to revive it creates new rights, and the statute runs from it. Farrell v. Gleason, 11 Cl. & Fin. 702.

(*b*) Sect. 3 enacts, "That all actions of debt for *rent upon an indenture of demise*, all actions of *covenant* or *debt upon any bond or*

[1] It is hardly necessary to observe, that although in perhaps most of the States the limitation acts are copied with more or less exactness from the statute of James, yet that their provisions are, in important particulars, of local application. The student may profitably refer upon this subject generally to Mr. Angell's treatise on Limitations.

The action of *covenant* is liable to the same observations as the action of debt founded on a deed; the same section of 3 & 4 W. 4, c. 42, has applied the limitation of twenty years to it also.(*a*)

other specialty, and all actions of debt or *scire facias* upon any *recognisance*, and also all actions of debt upon any *award* where the submission is not by specialty, or for any *fine* due in respect to any copyhold estates, or for an *escape*, or for *money levied on any fieri facias*; and all actions for any penalties, damages, or sums of money given to the *party grieved*, by any statute now or hereafter to be in force, that shall be used or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions or debt for rent upon an indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognisance, *within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after.*"

It is necessary, in pleading this statute, to allege that there has been *no* breach of the condition of such bond within the time limited. (Saunders v. Coward, 13 M. & W. 65.)

(*a*) The statute 3 & 4 W. 4, c. 27 (Real Property Limitation Act), s. 2, enacts that "no person shall make an entry, or distress, or bring an action to recover any land or *rent*, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person through whom he claims," &c. This section has no reference to rents reserved on leases for years by contract between the parties, as the conventional equivalent for the right of occupation; but must be confined to rents existing as an inheritance distinct from the land, and for which, before the statute, the party entitled might have had an assize, such as ancient rent service, fee-farm rents, or the like. "Recover" means "to obtain possession of or seisin of;" and "rent" means such rent as might in its nature have been the object of such recovery, and does not include rent reserved on common leases for years; see Grant v. Ellis, 9 M. & Wel. 113; for a person entitled to it has no estate in the rent, but only as an incident to the reversion; Prescott v. Boucher, 3 B. & Adol. 849, 23 E. C. L. R. But it applies to rent, the right to which is derived under a will. 3 Bing. N. C. 544, 32 E. C. L. R. Debt for arrears upon a covenant to pay annuity se-

[*307] *Now from these limitations, thus introduced by 3 & 4 W. 4, c. 43, there are certain excepted cases.

In the first place, by the fourth section of the act, if the person entitled to bring the action be an infant, a married woman, an insane person, or beyond the seas at the time when the right of action accrues, the time runs not from the accrual of the right of action, but from the removal of disability, as it is called.

In the second place, if the defendant be beyond seas, the time runs from his return; that is also by the act.

[*308] *In the third place, if an acknowledgment of the liability be given in writing, signed by the person liable, or his agent, the time runs from the date of that acknowledgment. This is by section 5.

In the fourth place, if there have been a part payment, either of principal or interest, time runs from such payment. This is also by section 5.

In the fifth place, if an action have been brought and the defendant outlawed, or judgment obtained against him, and arrested or reversed by writ of error, a new action may be commenced within a year after the reversal of the outlawry, or of the judgment. That is by section 6.

Such is the statutable time of limitation in actions on specialties, which, you will have observed, is now in every case twenty years, subject to the above exceptions. Now with regard to simple contracts.

The limitation of time in cases of actions upon

cured on land is barred after twenty years under this statute. Sims v. Thomas, 12 Ad. & El. 536, 40 E. C. L. R.

As to what payment of rent will take the case out of the statute, see recent cases in Doe dem. Spencer v. Beckett, 4 Q. B. 601, 45 E. C. L. R.

simple contracts, whether brought in the form of debt or of assumpsit, depends upon stat. 21 Jac. 1, c. 16, which applies both to *assumpsit* and to *debt* in *simple contract*. The words of the act are, "all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants."(*a*) *Assumpsit*, as *I have explained to you, was originally a species of action on the case. It therefore falls within the limitation prescribed by this statute, the period limited by which is, as you probably know, *six years*.(*b*) [*309]

All actions upon simple contracts must therefore be commenced within *six years*, unless they fall within

(*a*) The statute 21 Jac. 1, c. 16, s. 3, enacts, "that all actions of account, and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors, or servants), and all actions of debt grounded upon any lending or contract, without specialty, and all actions of debt for arrearages of rent, shall be commenced and sued within six years next after the cause of such action or suit, and not after."

(*b*) Where a promise is to do a thing on request, the statute runs from the time of the request, and not from the time when the promise was made; Holmes v. Kerrison, 2 Taunt. 323.

If any security has been given for the original debt which forms the ground of action, which security has been subsequently set aside or abandoned, a right of action then arises, and the statute runs only from the setting aside of the security, unless it appear that the original consideration had failed; Huggins v. Coates, 5 Q. B. 432, 48 E. C. L. R.; Cowper v. Godmond, 9 Bing. 748, 23 E. C. L. R. And where defendant gave a warrant of attorney to secure a debt payable by instalments, the plaintiff to be at liberty, in case of any default, to have judgment and execution for the whole, as if all the periods for payment had expired, it was held that, in an action of assumpsit on the implied promise to pay according to the terms of the defeasance, defendant might show that the first default was made more than six years before action; and that this was a complete defence, not only as to instalments due more than six years ago, but also as to those due within that period; Kemp v. Garland, 4 Q. B. 519.

[*310] *certain classes excepted from the operation of the statute of James I.

In the first place, that statute itself excepts the cases of the person entitled to the action being an infant, married, insane, or beyond seas at the time of the accruing of the right, and gives six years from the removal of the disability.(a)

[*311] *In the second place, it also contains the exception which I have just cited with regard to actions upon specialties in the case of the defendant being outlawed, or the judgment reversed or arrested. Indeed, the one is copied from the other.

In the third place, if the *defendant* be beyond seas

(a) But the statute runs notwithstanding any *subsequent* disability of the creditor, even from insanity or other cause; see Cassidy v. Steuart, 2 M. & Gr. 444 *n*. But by the third section of 12 & 13 W. 3, c. 3, it is provided "that where any plaintiff shall, by reason or occasion of privilege of Parliament, be stayed or prevented from prosecuting any suit by him commenced, such plaintiff shall not be barred by any statute of Limitation, or nonsuited, dismissed, or his suit discontinued, for want of prosecuting of the suit by him begun; but shall from time to time, upon the rising of the Parliament, be at liberty to proceed to judgment and execution." A similar provision is contained in 11 Geo. 2, c. 24, s. 3. The operation of the statute is barred by the saving clause, if a person, then in prison, when the cause of the action arises, during his imprisonment, commences an action after a lapse of six years; Piggott v. Rush, 4 Ad. & Ell. 912, 45 E. C. L. R. The words of the saving clause are, that "if any person entitled to an action, &c., shall be beyond seas, he shall be at liberty to bring it within six years after he shall have 'returned' from beyond seas; but he may reply to a plea of *non assumpsit infra sex annos*, that when he made the promises in the declaration he was then beyond the seas, as he has since been and still is; the person may, if he wishes, commence his action, though he is not obliged while any of the disabilities of the statute continue; Strithorst v. Græme, 3 Wils. 145. Where a disability has ceased, and the statute begun to run, no subsequent disability will stop it; Rhodes v. Smethurst, 4 M. & W. 651; and 6 M. & W. 351, 356.

when the right accrued,(a) the plaintiff has six years after his return, not by the statute of James, but by stat. 4 Anne, c. 16, s. 19, but *it is a singular thing, that "beyond seas" does not mean the same thing in this act of Parliament as in the acts of James and of William IV.; for by the 3 & 4 Wm. 4, c. 42, s. 7, it is directed that no part of the United Kingdom, or of Guernsey, Jersey, Alderney, Sark, or Man, shall be considered beyond seas, within the [*312]

(a) Plaintiffs may, if they choose, bring their action whilst abroad, or wait till their return when the statute begins to run; Le Veux v. Berkeley, 5 Q. B. 836, 48 E. C. L. R.; and see 2 Wm. Saunders, 120 *a*, notes *h* and *k*; Pigott v. Rush, 4 Ad. & Ell. 912, 31 E. C. L. R.; and Strithorst v. Græme, 3 Wilson, 145; and where one of two co-contractors is beyond seas, who is a defendant, the statute does not run; Fannin v. Anderson, 14 Law Journ. Q. B. 282 [7 Q. B. 811, 53 E. C. L. R.]; for that case decided, that although the statute commences to run when the right of action accrues, where there are several joint *claimants*, and one of them is within seas, where there are joint *debtors*, and one of them is abroad when the cause of action arises, the statute does not begin to run until his return. Thus a very important distinction arises between the position of co-plaintiffs and co-defendants. This distinction arose upon the wording of the 19th sect of statute of Ann. c. 16, together with the 21 Jac. 1, c. 16; and the reason of it seems to be, that one plaintiff can act for others and use their names in an action, and therefore the protection of the statute is not wanted. With respect to defendants, however, the reason does not apply; the plaintiff cannot bring the defendant into court by any act of his, and therefore if he be compelled to sue those who are within seas without joining those who are abroad, he may possibly recover against insolvent persons, and lose his remedy against the solvent ones who are absent. On the other hand, if he sue out a writ against all, and neither continues it without declaring, or proceeding to outlawry against the absent parties, declares against those within seas, he is placed in precisely the same situation as if the statute of Anne had never passed, and is obliged to incur fruitless expense, the avoiding of which seems to have been the object of the statute of Anne.

meaning of that act, or of the act of James I.; but, as the statute of Anne is not mentioned, it is held that the words "beyond seas" used in that act retain their common-law meaning, which was literally beyond the sea surrounding Great Britain, and therefore the Exchequer has decided in Lane v. Bennett, 1 Mees. & Wels. 70, that Ireland is not within the statute of Anne and that the plaintiff has still six years in which to bring his action after the return of the defendant, who has been in that part of the United Kingdom ever since the cause of action accrued; and here I may as well observe to you, that in every case of a statute of Limitations, if once the time of limitation begins to run, nothing that happens afterwards will stop it. (Smith v. Hill, 1 Wils. 134).(*a*)

[*313–314] *In the fourth place, if the defendant have given an acknowledgment by *writing signed*.(*b*) After the passing of the Statute of James,

(*a*) See ante, page 310, note (*c*).

(*b*) The statute 9 Geo. 4, c. 1, enacts "that no acknowledgment or promise *by words only* shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect by reason only of any written acknowledgment or promise made and signed by *any other or others of them*; provided always, that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatever: provided also that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts, or this act, as to one or

and until Lord Tenterden's Act, which I shall *immediately mention, an acknowledgment by mere words would have been sufficient; but, [*315]

more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

No part of the statute has given rise to more litigation than this saving clause. *It is now settled that the acknowledgment in order to bar the statute must contain an unconditional promise to pay; but the law implies such promise from an acknowledgment of the debt.*

Many of the older cases hold a different doctrine; such as Yea v. Fouraker, 2 Burr. 1099; Leaper v. Tatton, 16 East, 420; and Dorthwaite v. Tibbut, 5 M. & S. 75, per Lord Ellenborough; Scales v. Jacob, 3 Bing. 638, 11 E. C. L. R.; Clark v. Hougham, 2 B. & Cr. 149, 9 E. C. L. R.; Thornton v. Illingworth, 2 B. & Cr. 824; in which latter case Bayley, J., said, "The ground on which the statute proceeds is, that after a certain time it shall be presumed that a debt has been discharged. A new promise rebuts that presumption, and then the plaintiff recovers, not on the ground of having a new right of action, but that the statute does not apply to bar the old one." And Holroyd, J., added, "Where the statute of limitations has run, a new promise revives the debt *ab initio*, and that is equally the case whether the promise is made before or after the commencement of the action." Littledale, J., gave judgment to the same effect. This, however, is expressly overruled by the leading case of Tanner v. Smart, 6 B. & Cr. 603, 13 E. C. L. R., where, in an elaborate judgment, Lord Tenterden, C. J., says, "The only principle upon which it (an acknowledgment) can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and as such constitutes a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration the plaintiff succeeds: when it does not support them, *though it may show clearly that the debt has never been paid, but is still a subsisting debt*, the plaintiff fails." This decision was based chiefly on that of Heylin v. Hasting, Salk. 29, one of the oldest cases on the statute, and has been recognised and

[*316] by that, *which is the 9 G. 4, c. 14, the acknowledgment must be in *writing* "signed by the

cited in almost every subsequent case on the point. See Morrell v. Frith, 3 M. & W. 402; Bateman v. Pindar, 3 Q. B. 574, 43 E. C. L. R.; Hurst v. Parker, 1 B. & Ald. 92; Cripps v. Davis, 12 M. & W. 159; Gardner v. M'Mahon, 3 Q. B. 561; Hart v. Prendergast, 15 Law Journ. Ex. 223 [14 M. & W. 741].

The argument by which this decision by Lord Tenterden is supported, is this: "If an acknowledgment had the effect which the cases in the plaintiff's favour attribute to it, one should have expected that the replication to a plea of the statute would have pleaded the acknowledgment in terms, and relied upon it as a bar to the statute: whereas the constant replication ever since the statute to let in evidence of an acknowledgment, is that the cause of action accrued (or the defendant made the promise in the declaration) within six years." The inference suggested by this mode of pleading, it is humbly submitted, scarcely supports the doctrine that the acknowledgment is a new promise, and that the action is brought upon this new cause: for if it were so, a new assignment would be required, where the plaintiff declares (as he always does) on the old debt. (See Leaper v. Tatton, supra.) To this the defendant pleads the Statute of Limitations; and if the plaintiff can only rely on the acknowledgment as a "new cause of action," he ought then, according to the rules of pleading, to assign such new cause and fresh promise; and thereby distinguish it from the old ground of action, to which the defendant has pointed in his plea. The only reason why the new assignment is *not* required seems to be, that the acknowledgment is *not* a new cause of action, and there is one very cogent reason why it could not be so treated, namely, that if the issue turned upon the new promise, it would require a new consideration to support it; there being *no* new consideration, it is treated merely as a bar to the plea of the statute, and evidence of it is admitted under a traverse of that plea, without any necessity to reply to it specially.[1] It may appear somewhat presumptuous to subscribe to the opinion even of Lord Ellenborough and Mr. Justice Bayley in preference to that clothed with the authority of modern judgments; but it is scarcely possible to avoid observation on the difficulty of reconciling the admitted princi-

[1] The student will find the subject of these comments very carefully examined in the American note to Whitcomb v. Whiting, 1 Smith's Lead. Cas. 617.

party *chargeable,"[1] and the Court of Common Pleas has decided, in Hyde v. Johnson, 2 Bing. [*317]

ple, that the Statute of Limitations was only intended to bar the remedy, and not to discharge or extinguish the original debt (Higgins v. Scott, 2 B. & Ad. 413, 22 E. C. L. R.), with the modern doctrine: namely—that the exemption from the statute, which alone bars the remedy for the original debt, does not revive it, but creates a new one, springing from a new promise: for this is itself defective, as regards consideration, in the first element of a valid contract. But this is not all, for it appears that the words themselves of Lord Tenterden's Act favour the doctrine of Mr. Justice Bayley, and seem

[1] Statutes like that of 9 Geo. 4, c. 14, have been enacted in Maine, Massachusetts, New York, Mississippi, Arkansas, and perhaps in some of the other States; Colburne v. Averill, 30 Maine, 310; Williams v. Gridley, 9 Metcalf, 485; Wadsworth v. Thomas, 7 Barb. S. C. 445; Thornton v. Crisp, 14 Smedes & Marsh. 52; Ringgold v. Dunn, 3 Eng. 497. Apart from the operation of such statutes, it is now very generally held, on both sides of the Atlantic, that the fullest acknowledgment of a debt is not sufficient to take the case out of the limitation acts, if such acknowledgment be accompanied with expressions inconsistent with a definite promise to pay. Thus, a promise to make an arrangement to pay will not be sufficient, as it shows that the defendant instead of being willing to pay the debt as it stands, contemplates paying it in some other manner; Kensington Bank v. Patton, 2 Harris, 479; Morgan v. Walton, 4 Barr, 322; Oakes v. Mitchell, 15 Maine, 360. So of the statement of a debt in an insolvent petition, for the circumstances under which it is made are inconsistent with an immediate provision of payment; Christy v. Flemington, 10 Barr, 129. Such a statement as "I owe the debt, but won't pay it," which would be, under the older decisions, entirely sufficient to take the case out of the statute, would at the present day be wholly insufficient; Moore v. Bank of Columbia, 6 Peters, 92; Sigourney v. Drury, 14 Pick. 390; Barnard v. Bartholemew, 22 Id. 291; Munford v. Freeman, 7 Metcalf, 432; Allen v. Webster, 15 Wendell, 284; Berghaus v. Calhoun, 6 Watts, 220; Allison v. James, 9 Id. 381; Kensington Bank v. Patton, supra; Carruth v. Paige, 22 Vermont, 179 (approving Phelps v. Stewart, 12 Id. 256); Ventris v. Shaw, 14 New Hamp. 422; Burton v. Wharton, 4 Harrington, 296; Gardner v. M'Mahon, 3 Queen's Bench, 561; Hart v. Prendergast, 14 Mees. & Wels. 741.

[*318] N. C. 777,[1] 29 E. C. L. R., *that, there being no mention of an agent, a signature by an agent

to repel the construction that a promise, express or implied, is essential to bar the statute (as declared by his lordship in Tanner v. Smart, and by the Court of Exchequer in the recent case of Hart v. Prendergast, 14 M. & W. 741). The words are, that "*no acknowledgment* OR *promise* by words only shall be deemed sufficient evidence of a new *or continuing* contract, whereby to take any case out of," &c. It is submitted that the contemplation of a continuing contract, as well as the disjunctive conjunction distinguishing promises from acknowledgments, are irreconcilable with the notion that there must be a new promise, and that an acknowledgment is valid only because it implies one. Still more does it seem irreconcilable with the practical conclusion built upon this modern doctrine, and to which attention must now be drawn.

As long as the doctrine prevailed that it sufficed to show an acknowledgment which rebutted the presumption arising from the lapse of time that the claim was satisfied, it was not only immaterial whether a promise were made or not, but a condition with which such promise, if made, might chance to be coupled, would nowise have defeated the effect and virtue of the acknowledgment: for the acknowledgment was held to be in itself a bar to the statute, and no promise, either express or implied, was required. In Dorthwaite v. Tibbut, the debtor said he "*would not*," and in Leaper v. Tatton, he "*could not*," pay; and yet in both they were held to have sufficiently admitted the debt. But according to the doctrine now adopted from Tanner and Smart, any additional promise defeats the acknowledgment: so that however strongly the debt may be admitted, unless there be a promise to pay it, it cannot be enforced. Lord Tenterden said in Tanner v. Smart, "Upon a general acknowledgment, *where nothing is said to prevent it*, a promise to pay, may, and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule *Expressum facit cessare tacitum* prevail?" So rigorously has this been followed, that in the last reported case, Hart v. Prendergast (supra), the following written statement was held sufficient "acknowledgment *or* promise" to satisfy the statute! "I will not fail to meet Mr. H. (the plaintiff)

[1] The authority of this case was recognised in Clark v. Alexander, 8 Scott's New Rep. 147.

is not sufficient for the *purpose, so that it is [*319]
curious enough to observe that under this act a

on fair terms, and have now a hope that before, perhaps, a week from this date I shall have it in my power to pay him at all events, a portion of the debt, when we shall settle about the liquidation of the balance." Pollock, C. B., held, "It is not sufficient that the document contains a promise by the defendant to pay *when he is able, or by bill*, or a mere *expectation* that he shall pay at some future time; it should contain either an unqualified promise to pay, that is, a promise to pay *on request*, or if it be a conditional promise, or a promise to pay on the arrival of a certain period, the performance of the condition, or the arrival of that period, should be proved by the plaintiff. The only question in the present case is whether this letter contains a promise to pay the debt on request. Now, certainly it does not in terms contain such a promise." See also Spong v. Wright, 9 M. & W. 629; Morrell v. Frith, supra, and Cripps v. Davis, 10 M. & W. 159.

This doctrine as to the conditional ability has been carried further on the authority of Tanner v. Smart in the case of Waters v. Earl of Thanet, 2 Q. B. 757, 42 E. C. L. R., where the defendant gave an acknowledgment of certain overdue bills of exchange in a memorandum thus worded:—"I hereby debar myself of all future plea of the Statute of Limitations in case of my being sued for the recovery of the amounts of the said bills and of the interest accruing thereon at the time of my being so sued: and I hereby promise to pay them, separately or conjointly, with the full amount of legal interest on each or both of them, whenever my circumstances may enable me to do so, and I may be called upon for that purpose." Now in this case the defendant had become able to pay the bills above six years before the action was brought; but the plaintiff was ignorant of it. But it was decided that when a debtor, protected by the statute, promises to pay whenever he may be able, the creditor is expected to be on the watch, and when he brings his action must prove the ability which revives his right. The period at which it is revived is that of the fact taking place, *not* of his becoming acquainted with it.

These decisions are not only unsupported by the case of Heylin v. Hasting, from which that of Tanner v. Smart derived its authority, but are at variance with it: the words there used by the debtor were, "Prove it, and I will pay you;" and it was held, that "the

man's agent cannot bind him by the acknowledgment of a simple contract debt, though he may, under Lord Brougham's Act, by acknowledging a bond debt, which is a contract of so much more importance in the eye of the law. See, on the construction of Lord Tenterden's Act, Waters v. Tomkins, 2 C. M. & R. 726; Waller v. Lacy, 2 M. & Gr. 54, 39 E. C. L. R.

The fifth exception arises from a clause in Lord Tenterden's Act, which exempts from the operation of that Act the effect of any payment, whether of prin-

promise, *though conditional*, shall bring it back within the statute, *for the defendant waives the benefit of the act as much as by an express promise;* and Holt, C. J., having reserved the point, ten judges conferred and approved of the judgment; adding, that if the creditor proved the delivery of the goods, which he might do *at the trial*, it would suffice to take the case out of the statute. (See Salk. 29, and 1 Lord Raym. 389 & 421, S. C.) It has been also held, that an acknowledgment may *prima facie* satisfy the statute, but other evidence is admissible to rebut such inference; such, for example, as shows that a document was drawn up with a view to a debt being paid in a particular way. (Cripps v. Davies, 12 M. & W. 159.)

If the evidence be of a promise to pay on condition, and the condition be performed, it becomes absolute, and is a promise to pay on request. For instance, where the acknowledgment was, "I am in receipt of your letter of the 6th, handed me this morning. I have forwarded it to Mrs. J., with a request she will come over without delay to settle the business. May I beg you will write to her by the first post to press payment, and what she may be short I will assist to make up. I send you her address." This was held sufficient. Humphreys v. Jones, 14 M. & W. 3, per Parke, B.

Neither is it necessary that the sum due should be named; but if there is an unequivocal admission of the debt, and a difference only upon the amount, the operation of the statute is barred. (Waller v. Lacy, 1 M. & Gr. 54, 39 E. C. L. R.; Gardner v. M'Mahan, 3 Q. B. 561, 43 E. C. L. R.)

The promise or acknowledgment must, in all cases, be made before action brought; it is unavailable if made afterwards. (Bateman v. Pinder, 3 Q. B. 574.)

cipal or interest. Now, before Lord Tenterden's act passed, a part payment, *whether of principal or interest, had the effect of taking the debt in respect of which it was paid out of the operation of the statute (see Whitcomb v. Whiting, Dougl. 652), and therefore will have the same effect since Wyatt v. Hodson, 8 Bing. 309, 21 E. C. L. R.; Channell v. Ditchburn, 5 M. & W. 494; from the former of which cases you will see that where there are several joint debtors, payment by one takes the debt out of the operation of the statute *as against the others.*(a)[1] [*320]

(a) Stat. 9 Geo. 4. c. 14, s. 1, as we have seen, enacts that "no acknowledgment or promise shall deprive any party of the benefit of the statute, unless such acknowledgment or promise shall be in writing;" with this proviso, "that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest." There have accordingly, been many decisions as to what is a sufficient payment to bar the statute, of which some notice is expedient. It is not required that the whole sum due should be paid. In Bateman v. Pindar, 3 Q. B. 574, Wightman, J., said, "Part payment is an acknowledgment, and an acknowledgment, though not a promise in terms, may amount to one virtually; but, where it is not made till after action brought, it cannot prevent the operation of the statute." Part payment of interest equally suffices. (See Dowling

[1] Whitcomb v. Whiting forms one of Mr. Smith's selection of Leading Cases, and in the American note (1 Smith's Lead. Cas. 613, 4th Am. ed.) the student will find the rule established by that case very thoroughly discussed, and it is there shown that "the cases differ more widely upon the point involved in Whitcomb v. Whiting than upon any other question of law, and that there are opposite sets of determinations in the different States of this country, and even in the same State; in some of which the authority of that decision has been followed, and in others denied and overruled. The latter course has been adopted in the Supreme Court of the United States, in New Hampshire, South Carolina, Tennessee, Indiana, and Delaware, and until recently in Pennsylvania, while the former prevails in New England, with the exception of New Hampshire, and in most other parts of the Union."

[*321] *The last exception to which I have to advert is that arising out of the exception in the

v. Ford, 12 M. & W. 329.) Nor is it essential that the money should pass; for the actual statement of a mutual settlement of account between the parties is equivalent to a payment, if the party to whom the sum is owing agree that it shall be paid by the setting off of the same amount, so that the sum set off is evidence of payment, if the party against whom it is set off did not object to it when his account was settled. (Scholey v. Walton, 12 M. & W. 510.) The principle of this is, that the going through an account with items on both sides, and striking a balance converts a set-off into a payment, and is a transaction out of which a new consideration may be said to arise. See also Ashley v. James, 11 M. & W. 542.

Where a specific sum of money is due, as upon a promissory note, the mere fact of a payment of a smaller sum by the debtor to the creditor is some evidence of a part payment to take the case out of the Statute of Limitations. (Burn v. Boulton, 15 Law Journ. C. P. 97.) [2 C. B. 476, 52 E. C. L. R.] The character of such payments is rather matter of evidence than of law. The question will always turn upon the distinction between cross demands and set-off on the one hand, and part payment on the other; a distinction clear enough in principle, but dependent for its application on facts, and therefore not always applicable with ease. (Worthington v. Grimsditch, 7 Q. B. 479, 53 E. C. L. R.; Waugh v. Cope, 6 M. & W. 824.)

Payment of interest by one of the makers of a joint and several note is sufficient to take the case out of the Statute of Limitations as to the other maker, notwithstanding he joined in the note merely as a surety; and notwithstanding such payment be made more than six years after the note became due. So a payment made by one partner, after the dissolution of the partnership, on account of a partnership debt, and after six years have elapsed without any acknowledgment of the debt, has been recently held sufficient to take the case out of the statute as against the other partner, though the jury find that the payment was fraudulently made against his consent, and in concert with the creditor to revive the debt. (Goddard v. Ingram, 3 Q. B. 839, 43 E. C. L. R.)

As regards the evidence of payment, it appears that no *admission* of payment suffices unless it be in writing, and signed by the party chargeable.[1] (Willis v. Newham, 3 Y. & J. 518; Bailey v. Ashton,

[1] Willis v. Newham has, however, after having been reluctantly

statute *of James the First, of accounts between merchant and merchant. It was for a long time thought that the effect of this clause was to take [*322]

12 A. & E. 493; Jones v. Rider, 4 M. & W. 32); therefore the signature of a clerk to the party charged is not sufficient; it must be signed by the debtor himself. (Hyde v. Johnson, 2 B. N. C. 776, 29 E. C. L. R.) Whether the signature of one of several partners in a firm has the effect seems still a question. (Clark v. Alexander, 8 Scott, 163, per Tindal, C. J.) Although the fact that payment by one of them suffices seems to imply that the admission of it by one would equally suffice. Lord Abinger, C. B., and Mr. Baron Parke, have expressed an opinion that these decisions have gone too far (see Maghee v. O'Neil, 7 M. & W. 531); they are nevertheless not overruled. But although verbal admissions of payment are thus unavailing to bar the statute, where some proof of a payment is given, nothing in the statute prevents the adducing of oral evidence to corroborate such other proof, though it is not sufficient in itself to prove the payment. (Waters v. Tompkins, 2 Cro. M. & R. 723; Bevan v. Gething, 3 Q. B. 740, 43 E. C. L. R.; see also Bailey v. Ashton,

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followed, been recently overruled by Cleave v. Jones, 4 Eng. Law & Eq. R. 514, where it was held in the Exchequer Chamber that the statute of 9 Geo. 4 did not apply to admissions of payment, but only to promises or acknowledgments, and it was consequently decided, reversing the judgment of the Court of Exchequer, that an unsigned entry in defendant's books of a payment of interest on a promissory note was admissible, as evidence of part payment. "There is no case," said Lord Campbell, C. J., "against which the plaintiff has to contend, except Willis v. Newham. If we say that case was improperly decided, we have then only to turn to the construction of the statute, and that, we think, is in favour of the plaintiff in error. The effect of our decision will be to let in verbal evidence of an acknowledgment of payment on account. The legislature must have supposed that more mischief would arise from excluding such evidence than from admitting it, otherwise it would have used words that would apply to that case, as well as to a mere promise or acknowledgment in words only;" and a similar construction was put upon the statutes of Maine and Massachusetts (which have been taken from that of 9 Geo. 4), in the cases of Sibley v. Lumbert, 30 Maine, 353, and Williams v. Gridley, 9 Metcalf, 485.

dealings between merchants out of the Statutes of Limitation altogether, where there was an account-current between them, and enable a merchant to maintain an action at any time against another merchant in respect of debt contracted in the course of trade, and forming an item of such an *account; and you will find [*323] this view learnedly supported in the notes to Wm. Saund., Webber v. Twill, vol. ii. 121. But the Court of Exchequer has very lately decided that the exception in favour of merchants' accounts can only be taken advantage of in an action of account properly so called, not in an action upon promises. That decision is Inglis v. Haigh, 8 M. & W. 769, and the effect of it has been to render the old and almost obsolete action of account of considerable importance. Several actions of account have lately been commenced in consequence of the decision in Inglis v. Haigh, for the purpose of taking advantage of the exception of the statute in favour of merchants,(a) *and in all probability [*324] we in the course of a few months will hear a

12 A. & E. 493, 40 E. C. L. R.; Edan v. Dudfield, 1 Q. B. 302, 41 E. C. L. R., per Lord Denman, C. J.)

It is only necessary to remark, in addition, that the courts will allow a writ which has been issued in time, and which designates the plaintiffs wrongly, to be amended, where a new action would be barred by the statute. (See Brown v. Fullerton, 13 M. & W. 556; and Larkin v. Watson, 2 Cr. & Mee. 685.) But they will not do so where the object is to make another person a co-defendant, his nonjoinder having been pleaded in abatement. (Roberts v. Bate, 6 A. & E. 778, 33 E. C. L. R.)

(a) The conclusion thus justly drawn from this decision in the case of Inglis v. Haigh, has been subsequently narrowed by that of Cottam v. Partridge, 4 M. & Gr. 271, 43 E. C. L. R., which decided that an open account between two tradesmen for goods sold by each to the other, without any agreement that the goods delivered on the one side shall be considered as payment for those delivered on the other, does not constitute such an account as concerns the trade of merchandise be-

good deal of this ancient and almost forgotten form of action.

I have now gone through the various topics which I proposed to discuss with reference to contracts.(*a*)

tween merchant and merchant, within the exception of the Statute of Limitations; 24 J. 1, c. 16, s. 3. "In Inglis v. Haigh, 8 M. & W. 769," said Tindal, C. J., "the Court of Exchequer seems to have decided that the exception in the Statute of Limitations as to merchants' accounts applies only to cases where an action of account, or an action on the case for not accounting, will lie, but not to an action of *indebitatus assumpsit*. Without going so far as that decision (though I do not mean to impugn it), I think that the exception is not applicable where an action of account cannot be maintained; and I am of opinion that, under the circumstances of the present case, an action of account would not lie. [His lordship read the 3d section of the statute, 21 Jac. 1, c. 16.] The exception, therefore, extends only to such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, and cannot apply, except where an action of account, or an action on the case for not accounting, would lie. Is this a case in which an action of account could be maintained? It is laid down in Selwyn's Nisi Prius, p. 1, 8th edit., that 'by the common law, an action of account for the rents and profits may be maintained by the heir, after he has attained the age of fourteen years, against the guardian in socage; so at the common law, account will lie against a bailiff or receiver, and in favour of trade and commerce, by one merchant against another.' It has not been contended, that an action of account will lie in every case where there have been sales of goods between tradesmen, but only where there are mutual accounts, and an agreement has been come to that the one shall be set off against the other, and the balance alone is claimed by the party in whose favour it is found; for otherwise the case could not be distinguished from the ordinary one of goods sold and delivered, with a claim of set-off of a similar description."

(*a*) As many cases have recently occurred which tend to assist the subject, and which do not properly fall under the foregoing heads, they are annexed in the Appendix, under the title of "Subjects of Contracts."

APPENDIX.[1]

*SUBJECTS OF CONTRACTS. [*325]

DEFINITION OF THE SUBJECTS OF CONTRACTS—CONSTRUCTION OF CONTRACTS—SALES—STOPPAGE IN TRANSITU—WARRANTIES—DEBTS—BAILMENTS AND CARRIERS—GUARANTEES.

POTHIER says that "Contracts have for their object either something which one of the contracting parties stipulates for being given to him, and which the other party promises to give, or something which one of the party stipulates to be done or not done, and the other promises to do or not to do." Contracts, he says, produce obligations. Now obligations are, as far at least as their object is concerned, identical with the contract from which they spring, for that which the parties to it are obliged by contract to do or not to do is the subject of the contract itself. A definition, therefore, of the object of obligations is a definition of the subject of contracts. In describing these, Pothier says, "The object of an obligation may be either a thing (*res*) in the proper and confined signification of the word, which the debtor obliges himself to give, or an act (*factum*) which the debtor obliges himself to do or not to do." Not only things themselves (*res*) may be the object of

[1] This Appendix is from the pen of the English editor.

an obligation; the mere use or possession of a thing [*326] *may be so likewise. For instance, when a person hires anything, it is the use of the thing rather than the thing itself, which is the object of the obligation."

"All things which are in commerce may be the object of obligations; but it is necessary that it should be possible, for *impossibilium nulla obligatio est, l.* 85, *ff. de Reg. Jud.*" "But it is sufficient that the fact to which a person obliges himself in my favour be possible in itself, though it may not be so in respect to him, because, unless I am aware of that impossibility, I have a right to rely upon the performance of it, and he is effectually obliged to me *in id quanti mea interest non decipi.* He must blame himself for not having measured the extent of his capacity, and for having rashly engaged to do an act to which he was not equal."

"For an act to be the object of an obligation, it must be something determinate, therefore the 2d law, *ff.* § 5, *de eo quod certo loco,* decides, that if a person promises another to build a house, without saying where, he does not contract any obligation."(*a*)

Thus Pothier's definition of contracts, combined with that of obligations, defines the subject-matter of contracts, and applies alike to those which are of the na-

(*a*) Evans says in a note, that the obligation may acquire certainty from the relative situation of the contracting parties; but that that point is preferable to the principle of construction.

Pothier enumerates immoral and illegal obligations among the impossible; our law more properly regards them as void contracts, under which head Mr. Smith has fully treated of them in the sixth and seventh Lectures.

Pothier also names as a condition of the object of a legal obligation, that "the party in whose favour the obligation is contracted, ought to have an *appreciable interest* in the act being done." This interest is a consideration, and falls upon that head.

ture *of promises implied by law from the state of facts, and to express agreements between the parties.(a) [*327]

I. ON THE CONSTRUCTION OF CONTRACTS.

In order to ascertain the subject of a contract, it is often necessary that it be first correctly construed, in order to discover the intent of the parties. Where it consists merely of a sale or other simple transaction, this necessity does not arise; but where it relates to some special agreement, the rules of construction become of importance. In ethics, according to Paley, a promise is to be construed in the sense in which the promiser believed that the promisee accepted it. This rule does not hold in law; for it is obvious that the

(a) Pothier dissevers from the term Contract, all those obligations which the law imposes "in favour of another without any agreement between them;" among which are what he calls *quasi* contracts; such as when a person pays what he does not owe to another person, the law compels him to repay it, and this he terms an obligation, and not a contract; so also in cases where the obligation arises from "*quasi delicto*," or acts of negligence, whereby one person causes damage to another. These are, no doubt, in some degree distinguishable from ordinary contracts, and the latter class of cases, in many instances, belong to trespass and torts; but nevertheless the former class, as well as many injuries which are remediable by actions of debt and assumpsit, arise, according to English law, *ex contractu*, and fall within the class of implied promises. Thus the law always implies a promise to repay money if it shall prove to have been paid by mistake,[1] and to take due and proper care of goods hired or lent, the breach of which, as we have already seen, is the subject of an action for breach of that promise. See ante, p. 94, note.

[1] Unless where there has been laches, or unless the money was paid under compulsion of legal process. Marriott v. Hampton, 7 Term, 269, is a leading case upon this point, and will be found annotated in 2 Smith's Leading Cases, 237.

[*328] belief of the *promiser as to the acceptation of the promisee is not susceptible of that facility of proof which is required in the trial of a suit;[1] a much more practical rule is therefore adopted, and we find it thus tersely expressed in Mallam v. May, 13 M. & W. 517, by the Court of Exchequer:—"Words are to be construed according to their strict and primary acceptation, unless from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless in their strict sense, they are incapable of being carried into effect,[2] and subject always to the observation, that

[1] But upon taking the context of Dr. Paley in connexion with this isolated sentence, it will be seen that it is as sound at law as in morality; for he goes on to say, "It is not the sense in which the promiser actually intended it that always governs the interpretation of an equivocal promise, because, at that rate, you might excite expectations which you never meant nor would be obliged to satisfy. Much less is it the sense in which the promisee actually received the promise, for, according to that rule, you might be drawn into engagements which you never designed to undertake. It must, therefore, be the sense (for there is no other remaining) in which the promiser believed that the promisee accepted the promise. This will not differ from the actual intention of the promiser, where the promise is given without collusion or reverse; but we put the rule in the above form to exclude evasion in cases in which the popular meaning of a phrase, and the strict grammatical signification of the words differ; or, in general, wherever the promiser attempts to make his escape through some ambiguity in the expressions which he used. Temures promised the garrison of Sebastia that if they would surrender no blood should be shed. The garrison surrendered, and Temures buried them all alive. Now Temures fulfilled the promise in one sense, and in the sense, too, in which he intended it at the time; but not in the sense in which the garrison of Sebastia actually received it, nor in the sense in which Temures himself knew that the garrison received it, which last sense, according to our rule, was the sense in which he was, in conscience, bound to have performed it."

[2] See, also, Gwillim v. Daniel, 2 Cromp. Mees. & Rosc. 70, per Lord Abinger.

the meaning of a particular word may be shown, by parol evidence, to be different in some particular place, trade, or business, from its proper and ordinary acceptation."

According to this plain rule, mercantile contracts are to be construed according to the usages of the trade, or the peculiarities of the branch of commerce to which they relate. (See cases cited ante, p. 30.) It is matter for the jury in these cases to decide the sense in which such terms are used; Parker v. Gossage, 2 Cr. M. & Ros. 617; but not to construe a deed. "Usage," says Pothier, "is of so much authority in the interpretation of agreements, that a contract is understood to contain the customary clauses, although they are not expressed." The context will generally assist in finding the intention. The application of these plain rules will solve nearly every case which can occur; but where the terms of the contract are nevertheless helplessly ambiguous, the rule given by Pothier, derived from the civil law, is, that it must, as a last resource, be construed "against the person who stipulates anything, and in discharge of the person who contracts the obligation."

The cases in which the rules of construction are chiefly required is where the contract is conditional, or, in other words, where its performance on the part of one or both parties is contingent on something being done, or happening, *before it takes effect, and [*329] which is termed a *condition precedent.* Such conditions must be accomplished in the manner the parties most probably intended. The question whether a condition is precedent or concurrent, is likewise a question of the intention of the parties themselves as it appears on the contract, and not, as has been sometimes supposed, whether the agreement will bear a

cross action; see Fishmongers' Company v. Robertson, 5 M. & Gr. 199, 44 E. C. L. R., per Tindal, C. J., and Kemble v. Mills, 1 M. & Gr. 767, 39 E. C. L. R., per Tindal, C. J. The same rule applies to questions as to whether contracts are dependent or independent of each other, and also as to mutual covenants, and which are to be interpreted according to whether it were or not the intent of the parties that they should apply to the whole consideration on both sides, in which case the condition is a condition precedent to that of the other, but otherwise not so. See Slavers v. Scott, 3 Bing. N. C. 308, 32 E. C. L. R.

Examples of what are and are not conditions precedent, and of the construction put on them, will be found in Glaholm v. Hays, 2 M. & Gr. 257, 40 E. C. L. R.; Mackintosh v. The Midland Counties Railway Company, 14 M. & W. 548; Ireland v. Harris, 14 M. & W. 432; Parker v. Rawlings, 4 Bing. 280, 13 E. C. L. R.: Dawson v. Dyer, 5 B. & Ad. 584, 27 E. C. L. R.

Now, wherever there is a condition precedent, it must be performed before the party who is to perform it can have an action upon it; if not literally performed, at least substantially, unless he was prevented from doing so by some default of the opposite party, which exonerates him. See 2 Wm. Saunders, 352.

Where an action is brought on a breach of contract dependent on a condition precedent to be performed by the plaintiff, he must allege that it is performed in the declaration. See 1 Wm. Saunders, 320, c., and 2 Wm. Saunders, 107, b.

*II. OF SALES.(a) [*330]

Sales form by far the largest portion of the transactions of commerce and the subjects of contract. They include all agreements by which property is parted with for a valuable consideration, whether there be a money payment or not, provided that the bargain be made, and the value measured in money terms; for instance, it includes all cases where there is a transfer of credit, by which means the great bulk of commercial dealing is effected. Money itself very rarely passes, except in the small retail purchases of life. Even where cheques are drawn and paid, it frequently happens that no money passes. In the Clearing House in the city, where the London bankers exchange cheques drawn on them against each other, payments amounting to many millions sterling are thus made every week by means of a simple transfer of credit from one banking house to another. Contracts of sale, therefore, are by no means limited to sales for money; but, on the other hand, neither do they extend to bargains of barter: where one article or set of goods is intended to be exchanged for another, no price (*pretium*) being attached, it is not a sale, for the transaction is in the first instance made as an exchange of goods without reference to money payment.

The first requisite of a contract of sale is the ability of the vendor to sell. This he derives either from his absolute property in the goods, or from circumstances which give him a legal right to dispose of them. This he has not only when authorized to do so for another,

(a) As to sales of goods above the value of 10*l.*, which require to be in writing under the 17th section of the Statute of Frauds, see ante, Lecture IV.

as in the case of factors, but in certain cases without [*331] any *such authority, provided the sale be made in market overt, of which see Com. Dig. Market (E.); 2 Inst. 713; Lyons v. De Pass, 11 A. & E. 326, 39 E. C. L. R.; and Wilkinson v. King, 2 Camp. 336.[1] See also statutes 2 P. and Mary, c. 7, and 31 Eliz. c. 12. But the vendee would not be bound by a contract which the vendor had not the power to carry into effect.

Where the vendor is empowered to sell, there may be a complete and valid sale without delivery to and acceptance by the purchaser,[2] provided that the property has vested in him, which enables the vendor to maintain an action for goods bargained and sold (see Atkinson v. Bell, 8 B. & Cr. 277, 15 E. C. L. R.), and the test is the appropriation of the thing sold to the buyer with his assent, the bargain being completed (see Dixon v. Yates, 5 B. & Ad. 340, 27 E. C. L. R., per Parke, J.); but if anything remains to be done before delivery, as, for instance, to ascertain the weight or

[1] But it has been repeatedly held that the English law of market overt, which is dependent upon special custom (every shop being in London a market overt, as to goods usually and publicly sold there, 5 Coke, 84), has not been adopted here; Dame v. Balwin, 8 Mass. 518; Griffith v. Fowler, 18 Vermont, 390; Wheelwright v. De Peyster, 1 Johns. 480; Hoffman v. Carow, 22 Wendell, 285; Hosack v. Weaver, 1 Yeates, 478; Easton v. Worthington, 5 Serg. & Rawle, 130; Browning v. M'Gill, 2 Har. Johns. 308; Roland v. Gundy, 5 Ohio, 202; Lance v. Cowen, 1 Dana, 195; M'Grew v. Browden, 14 Martin, 17; Ventriss v. Smith, 10 Peters, 161.

[2] That is to say, *as between the parties* there may be a valid sale without delivery. The question depending upon the validity of sales with respect to *third parties*, where the delivery of possession does not accompany the sale, are too numerous to be here considered. The multitude of decisions to which this subject has given rise, will be found classified in the note to Twyne's case, 3 Coke, 80, in 1 Smith's Leading Cases, 34.

settle the price of the goods, the action will not lie; Rhoades v. Thwaites, 6 B. & Cr. 392, 13 E. C. L. R.[1]

[1] This statement must not be taken unqualifiedly. Where, *by the terms of the contract*, or what is the same thing, by the usage of trade, when it is a part of the contract, something remains to be done, such as counting, measuring, weighing, and filling up, to ascertain the number, quantity, and weight, then the rule stated in the text is applicable. Thus where bales of skins, said to contain five dozen in each bale, were sold at so much per dozen, and it was the duty of the seller, according to the usage of the trade, to count over the skins to see how much each bale contained, and before such counting, they were destroyed by fire, it was held that the purchaser could not be made liable for their value; Zagury v. Furnell, 2 Camp. 240. So, where the sale was of all the starch in the vendor's warehouse, at so much per hundred weight, the weight to be ascertained before delivery; Hanson v. Meyer, 6 East, 614. Similar instances will be found in Wythers v. Lyn, 4 Camp. 237; Wallace v. Breeds, 13 East, 422; Burk v. Davis, 2 Maule & Selw. 397 (explaining Whithouse v. Frost, 12 East, 614); Shepley v. Davis, 5 Taunt. 617; White v. Wilks, Id. 176; Simmons v. Swift, 5 Barn. & Cress. 857; Barrett v. Goddard, 3 Mason, 112; Ward v. Shaw, 7 Wendell, 406; Sumner v. Hawlett, 12 Pick. 82; Riddle v. Varnum, 20 Pick. 280; Davis v. Hill, 3 N. Hamp. 382; Smyth v. Craig, 3 Watts & Serg. 14; Hutchinson v. Hunter, 7 Barr, 140; Golder v. Ogden, 3 Harris, 528; Crawford v. Smith, 7 Dana, 61; Woods v. M'Gee, 7 Ohio, 466. So, by the French Code, when merchandise is not sold in the lump, but by weight, by counting, or by measure, the sale is not perfect, in this sense, viz., that the things sold are at the risk of the seller, until they may be weighed, counted, or measured. Art. 1585.

But where it appears that the parties intended that the sale should be perfect before such weighing, &c., the rule thus stated loses its application, Scott v. Wells, 6 Watts & Serg. 366; Dennis v. Alexander, 3 Barr, 51; Macomber v. Parker, 13 Pick. 175; Riddle v. Varnum, 20 Pick. 280; Downer v. Thompson, 6 Hill, 208, and delivery of possession is of course evidence to go to the jury, that such was the contract, Scott v. Wells; and it is said, in the recent case of Golder v. Ogden, 3 Harris, 528, that the rule in Pennsylvania is less stringent than in England, and that if there be a specific identification and preparation of the particular goods, the mere fact that

It is, however, quite immaterial whether the right of possession be out of the vendor, so long as the right of property is in the vendee; Sparks v. Marshall, 2 Bing. N. C. 761, 29 E. C. L. R.

To maintain an action for goods sold and delivered, it is requisite that there should be not only complete delivery to, but actual or implied acceptance by the buyer. The cases in which acceptance is required by the 17th section of the Statute of Frauds, and a definition of what it consists in, have been already explained (see ante, p. 71), and there is no sound distinction between the sort of acceptance required by that section and that required to maintain this action.[1] See a learned note by Mr. Smith on this point in his "Mercantile Law," p. 447, ed. 1843.

Goods, as we have seen, are delivered by any act which places them in the vendee's power or possession, without respect to where they may be placed. [*332] *See Salter v. Woollams, 2 M. & Gr. 650, 40 E. C. L. R.; Wood v. Manley, 11 A. & E. 34, 39 E. C. L. R.

As regards the time of delivery where goods are sold, and nothing is said about the time of delivery or of payment, the seller is bound to deliver them, provided the buyer is ready to pay the price, and a demand is sufficient *prima facie* evidence of such readiness; see 2 Wm. Saund. 352, a, in notis; and the delivery must take place within a reasonable period, and what is such is for the jury to decide; Ellis v. Thompson, 3 M. & W. 453.

The law has recently been fully laid down on this

they are to be counted, &c., will not prevent the transmission of title to the vendee, unless the contrary is expressly proved to have been the contract.

[1] But see supra, note to page 76.

subject in the case of Startup v. Macdonald, in error, 6 M. & G. 593, 46 E. C. L. R., where an action of assumpsit was brought for not accepting ten tons of linseed oil delivered at nine o'clock at night on the last of fourteen days specified as the period within which it should be delivered. Parke, B., thus stated the law: "A party who is, by contract, to pay money or to do a thing transitory to another anywhere on a certain day, has the whole of the day, and if on one of several days, the whole of the days, for the performance of his part of the contract; and until the whole day, or the whole of the last day has expired, no action will lie against him for the breach of the contract. In such a case the party bound must find the other at his peril (Kidwelly v. Brand, Plowd. 71), and within the time limited, if the other be within the four seas; Shepp. 136; and he must do all that, without the concurrence of the other, he can do, to make the payment, or perform the act, and that at a convenient time before midnight, such time varying according to the quantum of the payment, or the nature of the act to be done. Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party to whom the tender is made to receive and count; or if he is to deliver goods, he must tender them so as to allow sufficient time for examination *and receipt. This done, he [*333] has, so far as he could, paid or delivered within the time; and it is by the fault of the other only that the payment or delivery is not complete. But where the thing to be done is to be performed *at a certain place*, on or before a certain day, to another party to a contract, there the tender must be to the other party *at that place;* and as the attendance of the other is necessary at that place to complete the act, there the

law, though it requires that other to be present, is not so unreasonable as to require him to be present for the whole day where the thing is to be done on one day, or for the whole series of days where it is to be done on or before a day certain, and therefore it fixes a particular part of the day for his presence; and it is enough if he be at the place at such a convenient time before sunset on the last day so that the act may be completed by daylight; and if the party bound tender to the party there, if present, or, if absent, he be ready at the place to perform the act within a convenient time before sunset for its completion, it is sufficient; and if the tender be made *to the other party* at the place at any time of the day, the contract is performed; and though the law gives the uttermost convenient time on the last day, yet this is solely for the convenience of both parties, that neither may give longer attendance than is necessary; and if it happens that both parties meet at the place at any other time of the last day, or upon any other day within the time limited, and a tender is made, the tender is good. (See Bacon's Abr. tit. Tender (D.), Co. Lit. 202, a.) This is the distinction which prevails in all the cases: where a thing is to be done *anywhere*, a tender a convenient time before midnight is sufficient; where the thing is to be done *at a particular place*, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by day-
[*334] light, *and a convenient time before sunset. I therefore think that the tender was good in this case in point of time, and, consequently, that the plaintiffs having been able to meet with the defendant, actually to tender the oil to him a sufficient time before midnight to enable the defendant to receive, examine, and weigh the oil, performed, as far as they

could, their part of the contract, and were entitled to recover for the breach of it by the defendant."

The property is equally passed by the delivery of the goods to a third person as agent to the vendor, who becomes an agent by a notice given and agreed to by him for the object. The judgment of the Exchequer was thus delivered by Parke, B., in the case of Bryans v. Nix, 4 M. & W. 791:—"If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are placed in the hands of a depositary, no matter whether that depositary is a common carrier, or shipmaster employed by the consignor, or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough, and it matters not by what documents this is effected."

Where no question arises as to payment, the sale vests the property in the vendee, and gives him present power of possession, and a right to enforce delivery, which the vendor cannot withhold; for mere demand implies, as we have stated, a readiness to pay, and a formal tender is not necessary, unless there be some condition that the goods shall not be sold on credit; Bloxam v. Saunders, 4 B. & C. 941, 10 E. C. L. R.[1]

[1] It obviously cannot be here meant, that where nothing is said as to the terms of payment, the vendee can, immediately, without payment or tender, take the goods; for the contrary is the law, as was indeed said, supra, p. 332, and as was said in Mills v. Gorton, 3 Cromp. & Mees. 511, the general rule of law is, that where there is a sale of goods, and nothing is specified as to delivery or payment, although everything may have been done to divest the property out of the vendor, and to throw on the vendee the risk of the goods, there still results to the vendor out of the original contract a right to retain the goods until payment of the price; and the point actually

Where the payment is not made before delivery, a question often arises of a far more intricate nature, how far the vendor may rescind the contract, and what are the precise rights which he possesses. One of the last cases on this point, that of Martindale v. [*335] Smith, 1 Q. B., *389, 41 E. C. L. R., decides that where goods are sold on credit, and a time is fixed when the credit shall expire, unless it be expressly stipulated to the contrary, failure of payment at that time does not transfer the property in the goods to the vendor, but merely gives the vendor a right of action for the price, and if they are still in his possession, *a lien upon them*, which may be destroyed by tender of payment on the part of the buyer; but default of payment does not rescind the contract, or re-vest the property in the vendor, until a reasonable

decided in Bloxam v. Saunders, cited in the text, was, that because payment or tender was not made, and no credit appeared to have been agreed upon, the plaintiffs, who were assignees in bankruptcy of the purchaser, were not entitled to recover, and the rule is thus stated: "Where goods are sold, and nothing is said as to the time of the delivery or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded *upon payment of the price*, but the buyer has no right to have the possession of the goods *till he pays the price*. The buyer's right with respect to the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership or dominion, and payment or tender of the price is a condition precedent on the buyer's part, and until he makes such payment or tender he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him, but his right of possession is not absolute,—it is liable to be defeated if he becomes insolvent before he obtains possession; Yorke v. Hollysmith, 5 Term, 215."

time has elapsed; but though the case of Martindale v. Smith expresses no limitation as to the length of time that the property is thus, as it were, held in abeyance, the law is clearly pronounced in former cases on that point. Thus in Langford v. Tyler, Salk. 113, the rule was said to be this:—"After earnest given, the vendor cannot sell the goods to another without default in the vendee, and therefore, if the vendee do not come, and pay for, and take away the goods, the vendor ought to go and request him, and then if he do not come, and pay for, and take away the goods in a convenient time, the agreement is dissolved, and the vendor is at liberty to sell them to any other person." This rule, which, as Mr. Smith elsewhere remarks, is certainly the most convenient, seems to have been sanctioned by Lord Ellenborough, C. J., in Hinde v. Whitehouse, 7 East, 558, for his lordship considered that, after earnest, and before the payment of the whole price, the property is in the vendee, subject only to the vendor's *lien*, but that the vendor may, upon finding the vendee delay to accomplish his bargain, go to him, and request him to do so, and if he, after that, delay for an unreasonable time, may treat such further delay as equivalent to a consent to rescind the sale, and the property will thereupon become revested in himself. And so it has been thought, *e converso*, might the vendor's unreasonable delay to deliver the goods *when he had stipulated so to do, perhaps entitle the vendee to rescind. See Barber v. Taylor, 5 M. & W. 527. [*336]

Thus the vendor has a lien for the price, where he has no right to rescind the contract on account of default by the vendee. Lien is right of temporary possession against the person who has the right of property, until the claim of the holder respecting it is satisfied by the owner. This lien, however, in the cases mentioned,

is confined to the right to retain goods whilst they remain in the hands of the seller, but there is one very important exception to this rule; it is this: when the unpaid vendor has reason to suspect the insolvency or bankruptcy of the vendee, he may stop or retake the goods after they have left his hands, and whilst they are in the course of transit to the buyer. Mr. Smith, in his Mercantile Law (p. 461), thus explains the comparative rights of the vendor to retain goods as a lien for the price in ordinary cases, and to stop in transitu in cases of insolvency: "Where the vendor has done that which amounts to a delivery of the goods, *ex gr.* has made a *symbolical* transfer of property, which is, by its nature, (*a*) unfit to be delivered otherwise; as, for instance, by giving up to the vendee the key of the warehouse where it is deposited, (*b*) or giving a delivery order to the wharfinger in whose possession it is, to [*337] which order the wharfinger has signified *his assent; (*c*) or where he has done any act which would determine his right to stop *in transitu*. But it must be observed, that the converse of this last proposition is not true, for many acts will be sufficient to divest the vendor's lien for his price, which will not be sufficient to hinder him from stopping the goods *in transitu*, if the vendee should become insolvent. For instance, delivery of goods to an agent of the vendee

(*a*) Manton v. More, 7 T. R. 67; Hibbert v. Carter, 1 Id. 745; Lempriere v. Pasley, 2 Id. 485; Zwinger v. Samuda, 7 Taunt. 265, 2 E. C. L. R.; Lucas v. Dorrien, Id. 278.

(*b*) Ellis v. Hunt, 3 T. R. 464; Copeland v. Stein, 8 Id. 199; Spears v. Travers, 4 Camp. 251; Greave v. Hepke, 2 B. & A. 131, 22 E. C. L. R.

(*c*) Lucas v. Dorrien, 7 Taunt. 278, 2 E. C. L. R.; Hawes v. Watson, 2 B. & C. 540, 9 E. C. L. R.; Harman v. Anderson, 2 Camp. 243; Stoveld v. Hughes, 14 East, 408; Stonard v. Dunkin, 2 Camp. 344; Cumming v. Brown, 9 East, 506; Swanwick v. Sothern, 9 A. & E. 900, 36 E. C. L. R.

appointed to convey them to him, deprives the vendor of his lien for the price, but not of his right to stop the goods *in transitu*, in case of the vendee's failure before they have reached him.(*a*) A delivery of part of the goods, where there is no intention of separating that part from the whole, divests both the lien and the right to stop *in transitu*;(*b*) but it is otherwise where there is such an intention,(*c*) though it has been said that *prima facie*, a delivery of part imports an intention to deliver the whole.(*d*) The vendor's lien cannot be determined by a second sale of the same goods, for the ordinary rule of law is, that the second vendee of a chattel cannot stand in a better situation than his own immediate vendor.(*e*) Where the goods are in the vendor's own warehouse, he does not lose his lien by *giving a delivery order;(*f*) nay, even a charge made by the vendor against the vendee for warehouse rent does not destroy his lien; at all events not where the charge is pursuant to the terms of the original contract of sale, for then the rent is only, as it were, an additional price.(*g*) But it would, perhaps, be otherwise if the charge for warehouse rent were founded on a subsequent distinct contract, for that [*338]

(*a*) See a learned note by Mr. Starkie, Law of Evidence, 2d ed. p. 892.

(*b*) Slubey v. Heyward, 2 H. Bl. 504.

(*c*) Bunney v. Poyntz, 4 B. & Ad. 570, 24 E. C. L. R.; Simmons v. Swift, 4 B. & C. 857, 10 E. C. L. R.; Dixon v. Yates, 5 B. & A. 339, 27 E. C. L. R.; Miles v. Gorton, 4 Tyrwh. 295.

(*d*) Per Taunton, J., in the case of Betts and another v. Gibbins, 4 N. & M. 77, 30 E. C. L. R.; 2 Ad. & El. 73, 29 E. C. L. R. Sed quære.

(*e*) Dixon v. Yates, 5 B. & Ad. 339, 27 E. C. L. R.; Small v. Moates, 9 Bing. 592, 25 E. C. L. R.

(*f*) Townley v. Crump, 4 A. & E. 58, 31 E. C. L. R.

(*g*) Miles v. Gorton, 4 Tyrwh. 295.

might have the effect of making the seller's warehouse that of the buyer.(*a*) The vendor may of course avoid the sale, by showing fraud in the vendee, ex. gr.; that he deterred others from bidding by his representations."(*b*)

Bayley, J., in Bloxam v. Sanders, 4 B. & Cr. 948, after speaking of the vendor's right to stop *in transitu*, says, "And if this be the case after he has despatched the goods, and while they are *in transitu*, *à fortiori*, is it, where he has never parted with the goods, and when no *transitus* has begun. The buyer, or those who stand in his place, may still obtain the right of *possession*, if they will pay or tender the price; or they may still act upon their right of *property* if anything is done unwarrantable to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which the right of *property* and right of *possession* are both requisite, unless they have both those rights."

[*339] *III. STOPPAGE IN TRANSITU.[1]

The vendor's right to stop *in transitu* depends on two main points; first the bankruptcy or insolvency of

(*a*) Hurry v. Mangles, 1 Camp. 452; Winks v. Hassall, 9 B. & C. 375, 17 E. C. L. R.

(*b*) Fuller v. Abraham, 3 B. & B. 116, 7 E. C. L. R.; Noble v. Adams, 7 Taunt. 59, 2 E. C. L. R.; Earl of Bristol v. Welmore, 1 B. & C. 514, 8 E. C. L. R.; Gladstone v. Hadwen, 1 M. & S. 517.

[1] In the note to Lickbarrow v. Mason, in 1 Smith's Leading Cases, 711 (4th Am. ed.), the student will find both the English and American authorities, upon the subject of stoppage in transitu, carefully considered.

the vendee;(a) and, secondly, that the goods are still in the course of transit, and are neither actually nor constructively in the possession of the vendee, for when that happens the transit is ended, and with it ceases the right to stop *in transitu*. This right is thus defined by Bayley, J., in Bloxam v. Sanders: "The vendor's right, in respect of the price, is not a mere lien, which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If the seller has despatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu*. Why? Because the *property* is vested in the buyer, so as to subject him to the risk of any accident, but he has not an indefeasible right to the *possession;* and his insolvency, without payment of the price, defeats that right."

The stoppage may generally be made at any time during the transit. In Stokes v. La Riviere, cited in Bottingk v. Inglis, 3 East, 381, Lord Mansfield, C. J., said, "No point is more clear than that if goods are sold and the price not paid, the seller may stop them *in transitu*. *I mean in every sort of passage to the hands of the buyers*. There have been a hundred cases of this sort. Ships in harbour, carriers, bills have been stopped. In short, where the goods are *in transitu*, the seller has *that proprietory lien. *The goods are in the hands of the defendants to be conveyed;* the [*340] owner may get them back again." And it was also held, in Dixon v. Yates, 5 B. & Ad. 315, 27 E. C. L.

(a) At least *the ordinary right* of countermanding the actual delivery of goods sent to a consignee, is limited to cases of insolvency or bankruptcy; and it seems that this is not a condition which in no case admits of exception. See Wilmshurst v. Bowker, 2 M. & Gr. 812, and the case of the Constantia, 3 Rob. Adm. Reports, 321.

R., by Littledale, J., that "so long as goods sold and unpaid for remain in the immediate possession of the vendor, he may refuse to deliver them: and if they remain in the possession of his agent, i. e. a warehouseman or carrier, he may stop them."

This very general rule must, however, be taken with some degree of qualification, and applied only to cases of insolvency or bankruptcy, since the reversal in error of the case of Wilmshurst v. Bowker, 7 M. & Gr. 882, 49 E. C. L. R.

In that well-known and much-litigated case, the plaintiffs bought a quantity of wheat of the defendants, under the following contract: "Sold, the 25th of October, 1836, to Messrs. J. W., and Son, about 300 quarters of wheat, as per sample, at 51*s*. per quarter, on board. Payment by banker's draft on *London* at two month's date, to be remitted on receipt of invoice and bill of lading." On the 27th of October the wheat was put on board of a general ship, under a bill of lading, by which it was made deliverable "to order or assigns, he or they paying freight," &c. The defendants caused an insurance to be effected on the wheat by their agents, which insurance was forwarded to the plaintiffs, in pursuance of an arrangement with the plaintiffs, whereby they were to charge them the premium in addition to the cost price of the wheat. The defendants sent the plaintiffs the bill of lading endorsed generally, and an invoice, stating the wheat to be shipped by order, and *for the account and risk of the plaintiffs*. Upon the receipt of the invoice and bill of lading, the plaintiffs, instead of a banker's draft on *London*, transmitted to the defendant their own acceptance for the invoice price of the wheat, and the cost [*341] of the insurance, which the *defendants immediately returned, informing the plaintiffs by

letter that such acceptance was contrary to agreement, and that they had arranged otherwise for the disposal of the cargo, which they obtained back from the captain of the vessel, *and resold*. The Court of Common Pleas held, that "There is no doubt that the *property* in the wheat passed to the plaintiffs under the contract, upon which point much of the argument before us has turned; but the question is, as to the intention of the parties, as evidenced by the contract, with reference to the *delivery of possession*. And we are of opinion, that the intention of the parties, under this contract was, that the consignor should retain the power of withholding the actual delivery of the wheat, in case the consignees failed in remitting the banker's draft, not upon the delivery of the wheat, but on the receipt of the bill of lading, which in the ordinary course of business, would precede the arrival or delivery of the wheat. And we think the object of making the receiving of the invoice and bill of lading, and the remitting of the banker's draft, to be simultaneous or concurrent acts, could have been no other than to afford security to the consignors, so that in case the consignees failed in the performance of the latter stipulation, the consignors might withhold the actual delivery of the cargo. When goods are sold and nothing is said about the time of delivery or the time of payment, the seller is bound to deliver them whenever they are demanded *on payment of the price;* but the buyer, as is observed by Mr. Justice Bayley, in Bloxam v. Sanders, 4 B. & C. 948, has no right to have the possession of the goods until he pays the price. In the present case, it is part of the stipulation that something shall be done by the buyer before the time when, in the usual course of business, the goods can be actually delivered; namely, upon the handing over of the bill of lading to the

[*342] *buyers, which ordinarily precedes the arrival of the ship; so that the right to the possession of the goods could not vest until the buyer either remitted, or tendered, or offered to remit, the banker's draft in payment."

Now these principles were expressly sanctioned by the Exchequer Chamber, and are therefore valuable as rules of law. The judgment was reversed on these grounds:—"We accede," Lord Abinger, C. J., said, "to the general principle laid down by the court below, and if the facts had been before a jury, we are not prepared to say that they might not have drawn the inference that the remitting of a banker's draft was a condition precedent to the vesting of the property in the wheat in the plaintiffs. But we draw no such inference from what appears upon the record. The delivery of the bill of lading, and the remitting of the banker's draft, could not be simultaneous acts; the plaintiffs must have received the bill of lading and invoice before they could send the draft. The default on the part of the plaintiffs amounts to no more than this, that they have omitted to perform one part of their contract;" 7 M. & Gr. 891, 49 E. C. L. R.

Thus the case appears to fall within the rules applicable to the ordinary one of a vendor who having sold on credit has not been paid. There was no insolvency on the part of the consignee, and nothing therefore to give the consignor the extra power of stopping *in transitu*: the payment was a condition subsequent, and not a condition precedent, and the case is analogous to that of Martindale v. Smith, supra.[1]

[1] In the very recent case of Rogers v. Thomas, 20 Connect. 53, a quantity of lumber was sold by the plaintiffs to one Moulton, who had been insolvent for some years before the sale, but this the plaintiffs did not discover until after they had shipped the lumber, when

Whether the effect of stoppage *in transitu* is merely to restore the possession, or to rescind the sale, has been a much-vexed question. The modern opinions very strongly incline to the conclusion that it does not rescind the sale, but merely places the parties in the same position as if they had not parted with the goods.

To this view the Court of Exchequer strongly inclined *in the recent case of Wentworth v. Outhwaite, 10 M. & W. 436, the Lord Chief Baron (Abinger) alone dissenting. Lord Kenyon thought it did not rescind the sale, and called it "an equitable lien adopted by the law for the purposes of substantial justice;" and so thought Mr. Justice Bayley, as may be gathered from the judgment above cited in Bloxam v. Sanders. See also Edwards v. Brewer, 2 M. & W. 375; Stephens v. Wilkinson, 2 B. & Ad. 323, 22 E. C. L. R.; and Wilmshurst v. Bowker, 5 Bing. N. C. 547, 35 E. C. L. R. In point of principle there appears to be no distinction between the stoppage of delivery before and after the delivery of the goods: it is in either case the exercise of a right to [*343]

they immediately stopped it in transitu, and brought trover against the sheriff, who had attached it in the mean time as the property of Moulton. The Court, however, held (Waite, J., dissenting), that in order to authorize a stoppage in transitu there should be some ostensible and certain criterion by which the insolvency of the vendor may be ascertained, and that it should consist in some visible change in his pecuniary situation—some open, notorious act on his part, calculated to affect his credit; and it was further held that it was not sufficient that such insolvency exist when the sale takes place, but that it must intervene between the sale and the exercise of the right of stoppage. But this decision certainly went very far, especially upon the latter point, and the Court rested its decision not on any authority in support of such a principle, but on the absence of any authority to the contrary.

withhold delivery. Why the stoppage of an inchoate delivery should be fraught with results wholly distinct from those resulting from withholding a delivery which has not begun, we know not; the parties are the same, their respective rights until stoppage are the same, and the exercise of the right by the vendor is virtually the same in both cases. The fact that the goods are stationary in the one case and in transit in the other, does not present a reason why their stoppage should vest the property in them in one case in the *vendee*, and in the other in the *vendor*. It appears, therefore, to be the sounder conclusion, that stoppage *in transitu* does not rescind the sale.[1]

The person who stops goods *in transitu* must, if not the vendor, stand in the position of vendor, and not in that of a mere surety for the price. (Siffken v. Wray, 6 East, 371.)[2]

[1] The law was considered to be so settled in Newhall v. Vargas, 13 Maine, 93; S. C. 15 Id. 314; Jordan v. James, 5 Ohio, 98; Rogers v. Thomas, 20 Connect. 53.

[2] This is well illustrated by the recent case of Bird v. Brown et al., 4 Exchequer, 786. Illins, a New York merchant, had shipped by several vessels to Carne & Telo, merchants at Liverpool, by their order, large quantities of corn, and had drawn bills on them for the amount, some of which had been purchased at New York by Brown, Brothers & Co., a branch of defendants' Liverpool house. Carne & Telo stopped payment on the 7th April, and on the 3d of May one of the vessels arrived at the port of Liverpool, where a notice of stoppage in transitu was immediately served on the master and consignees of the vessel, by the defendants, Brown, Shipley, & Co., who under it obtained possession of the shipment. On the 28th of April, Illins heard of the insolvency of Carle & Telo, and immediately executed a power of attorney to one Hubback of Liverpool to stop the goods in transitu. Hubback ratified the act of Brown, Shipley & Co., and Illins himself confirmed it as soon as he heard of it. Trover was brought by the assignee in bankruptcy of Carne & Telo, who had demanded the corn and tendered the freight two days before the arrival of the power of attorney to Hubback, and it was contended

The recent case of Jenkyns v. Usborne, 7 M. & Gr. 678, 49 E. C. L. R., throws considerable light on the question of who may exercise the right of stopping *in transitu;* and it is also a good example of the transactions out of which these questions usually arise. Certain merchants of London had ordered beans of B. and C., Leghorn merchants, through the plaintiff, their agent. B. and C. *shipped more than the quantity ordered, and drew two bills upon the [*344] London merchants, one for the quantity ordered, and the other for the residue, and they transmitted those bills to the London merchants through the plaintiff, with a letter of advice and an endorsed bill of lading for the whole cargo. The beans were shipped in 3932 sacks. The London merchants accepted the bills for the beans ordered, but declined to take the residue, or to accept the bill drawn against them. The plaintiff, however, consented to take the residue of the beans, and the London merchants thereupon wrote a letter to him, acknowledging such residue to be his, and inclosed an order to the captain to deliver to the bearer the residue of the sacks. The plaintiff thereupon handed over the bill of lading to the London merchants, and accepted the bill drawn against the residue of the cargo, and paid it at maturity. Before the arrival of the ship the plaintiff sold the residue to E., who accepted a bill for the amount drawn by B., who happened to be in London, and the plaintiff handed to one Thomas the

for them that the defendants not being the general agents of Illins, but being only interested indirectly by reason of the purchase of Carne & Telo's paper, had no right originally to stop in transitu, and that the maxim, *omnis ratihabitio retrotrahitur et mandato equiparatur,* was inapplicable to a case where the rights of third persons had vested in the interval (see to the same effect Wood v. M'Kain, 7 Alabama, 800); and the Court were of this opinion, and gave judgment for the plaintiffs.

letter of the London merchants and the delivery order. Thomas afterwards applied to the defendant for an advance of cash, and handed him over as a security (*inter alia*) such letter and delivery order, and the defendant gave his acceptance to Thomas for the amount of cash required, which acceptance was honoured at maturity. Before Thomas's acceptance became due, and before the arrival of the ship, Thomas stopped payment. When the ship arrived, the portion of the cargo for which the London merchants had accepted the bill was delivered to him. On these complicated facts the question arose whether the plaintiff had such a property in the goods as to enable him to stop *in transitu*. The judgment in the following passage, fully explains the law on this subject:

"It was objected that it is only the owner of the goods who can exercise that right; and that, in this [*345] case, the *property in the goods had not vested in the plaintiff at the time of the stoppage, but only an interest in, and right to receive, a certain portion of the cargo, to be afterwards ascertained and appropriated to the parties intended: but we see no sound distinction, with reference to the right of stoppage *in transitu*, between the sale of goods, the property of which is in the vendor, and the sale of an interest which he has in a contract for the delivery of goods to him; if he may rescind the contract in the one case for the insolvency of the purchaser, he must, by parity of reason, have a right to rescind it in the other. But it is further objected, that the agreement between the plaintiff and Thomas, coupled with the delivery order signed by the endorsees of the bill of lading, and the subsequent transfer of the rights of Thomas to the defendant for a valuable consideration, put an end to the right of stoppage *in transitu:* and that such an

arrangement was treated as equivalent to an actual assignment of the bill of lading, which, if made to a *bona fide* purchaser for value, would have that effect.

"The actual holder of an endorsed bill of lading may undoubtedly, by endorsement, transfer a greater right than he himself has. It is at variance with the general principles of law, that a man should be allowed to transfer to another a right which he had not: but the exception is founded on the nature of the instrument in question, which, being like a bill of exchange, a negotiable instrument, for the general convenience of commerce, has been allowed to have an effect at variance with the ordinary principles of law. But this operation of a bill of lading being derived from its negotiable quality, appears to us to be confined to the case where the person who transfers the right is himself in possession of the bill of lading, so as to be in a situation to transfer the instrument itself, which is *the symbol of the property itself. In the present case, Thomas was not in possession of the [*346] bill of lading: he had only an order on the captain to deliver the goods on arrival; and when, under the circumstances stated in the case, that order was handed over to the defendant, it appears to us, that, although an interest in the *contract* passed to the defendant, the interest in the *goods* did not pass, as it would have done if the transfer had been by assignment of the bill of lading; but that such interest in the goods was still liable to be defeated by the insolvency of Thomas, and a proper exercise of the right of stoppage *in transitu*."

In the case of Akerman v. Humphrey, 1 C. & P. 53, 12 E. C. L. R., certain goods had been consigned by Dent to Hutchinson; an invoice had been sent to Hutchinson, and a shipping-note, advising him that the goods had been shipped for him on board the

Durham, for Hay's wharf. Hutchinson handed over the shipping-note to Akerman as a security for money advanced upon it by Akerman, and gave him an order upon the wharfinger to deliver the goods to him on arrival. Hutchinson became insolvent, and the goods were stopped *in transitu*. Mr. Justice Burrough said, "I do not think the giving of the shipping-note and the delivery-order to the plaintiff made a change in the property; and I think the shipping-note does not amount to a bill of lading. A bill of lading is exactly like a bill of exchange, and the property it refers to passes by endorsement of it, but not by delivery without endorsement.[1] I do not think this shipping-note,

[1] It will be observed, from the above intimations in the cases of Akerman v. Humphreys, and Jenkyns v. Usborne, supra, that the learned judges appeared to consider bills of lading in the light of negotiable instruments, and therefore that their endorsement over for value, would vest in the holder a valid title to the goods to which they refer, as against the true owner. Such, too, seems to have been suggested in Berkeley v. Watling, 7 Ad. & Ell. 22, 34 E. C. L. R, and Bell v. Moss, 5 Wharton, 205, and such has been frequently thought to be the effect of the decision in the well-known case of Lickbarrow v. Mason, 2 Term, 63, 1 H. Black. 357, 6 Id. 21, 3 Term, 367, 683, *in notis*. The better opinion, however, would appear to be, that no such broad effect of negotiability can properly be given to such instruments, and that the transfer or endorsement of a bill of lading can of itself create no better title to the goods which it represents, than would be created by the transfer of the goods themselves. This may be perhaps explained by reference to a few familiar principles.

Nothing is better settled, upon reason and authority, than that the sale of a chattel will confer no property in the purchaser, where the seller has neither title in himself, nor authority from him who has the title. The exceptions to this are perhaps but two: 1, in cases of sales at market overt, which, as we have already seen, have no existence in this country; and, 2, where the course of the true owner has been such as to estop him from asserting his title, as in case he should stand by and see his property sold, without objection; Gregg v. Wills, 10 Ad. & Ell. 90. With these exceptions, the rule

from the nature of it, is endorsable; and here, in point of fact, it is not endorsed; therefore, in my judgment, there is no change of property."

is believed to be as stated, nor is it altered by the fact of the vendor having the possession of the chattel, or of the vendee being a *bona fide* purchaser for value; Williams v. Barton, 3 Bing. 129, 11 E. C. L. R.; Peer v. Humphrey, 2 Ad. & Ell. 495, 29 E. C. L. R.; Hyde v. Noble, 13 N. Hamp. 434; Cowell v. Hill, 4 Denio, 323; Leckey v. M'Dermott, 8 Serg. & Rawle, 500; Stanley v. Gaylord, 1 Cushing, 228; Ingersoll v. Emmerson, 1 Smith, 77; and see the cases, supra, on page 246, illustrative of the rule that a factor cannot pledge. If this be the law as to the goods themselves, it would seem to apply equally to such instruments as are the representatives of the goods, as the possession of such instruments cannot confer more power over the property than would the possession of the property itself; Newson v. Thornton, 6 East, 41; Hatfield v. Williams, 9 Mees. & Wels. 467. It is, however, equally well settled, that in order to give validity to a sale as against all but the vendor, delivery of possession is necessary. Yet in many instances this is impossible, as in the case of goods at sea, and then a constructive delivery is made by the transfer of the symbol of the property. Hence it is, that from necessity, the transfer and endorsement of a bill of lading, which is merely the symbol of the property to which it refers, will, when made by one having the authority to do so, pass as valid a title to the purchaser, as the actual delivery of the property itself. It can, however, pass no *better* title, and, as between the parties themselves, the sale would be as effectual without as with the delivery, and consequently without as with the transfer and endorsement of the bill of lading; Nathans v. Giles, 5 Taunton, 558, 1 E. C. L. R.; Gardner v. Howland, 2 Pick. 599.

The argument in favour of the negotiability of bills of lading, has generally been that the necessities of commerce require that one possessed with the indicia of title, should be able to convey a title in the subject which they represent, and that if the loss is to fall upon one of two innocent persons, it should rather rest on him who has thus enabled the seller to commit a fraud, than upon an innocent and perhaps a vigilant purchaser. It is obvious, however, that if this argument is to apply in the case of the possession of what is the type or symbol of a chattel, it should equally apply in the case of the possession of the chattel itself, and the argument would therefore seem to prove

Manifold questions have arisen whether the transit was at an end at the time of this stoppage; in other words, whether the goods had passed into the possession of the vendee, and this often involves collateral questions *of constructive possession. As they [*347] all affect the same point, and are determined by the same rules, we shall examine them together.

When goods are in the hands of a carrier, and the vendee takes them into his own, whether with or with-

too much. And it is worthy of remark, that the recent statutes in England, and in some of our own States, which give to persons entrusted with the possession of bills of lading, dock warrants, and the like, power to contract for the sale, &c., of the goods which they represent, so as to bind the true owner, almost necessarily imply that such power is not derived from the common law, but is the creation of legislative enactment. See the statutes referred to in the note to page 246, supra, and the cases of Evans v. Trueman, 2 Barn. & Ad. 886, 22 E. C. L. R.; Bonzi v. Stewart, 4 Man. & Gr. 326, 43 E. C. L. R., and Hatfield v. Phillips, 9 Mees. & Wels. 647, S. C. 14 Id. 665. "The result of the cases, therefore, as a whole," as has been said in the note to Lickbarrow v. Mason, 1 Smith's Leading Cases, 758, 4th American edition, "seems to be, that while on the one hand the possession of bills of lading, or other documents of the same nature, may be evidence of title, and equivalent for some purposes to actual possession, yet that on the other, it does not constitute title, nor dispense with the rule, *nemo plus juris ad alienum transferre potest quam ipse habet.* This construction of the law seems to be the only one consistent with actual decision, and should therefore be adopted, even if inconsistent with some occasional dicta. It may, no doubt, operate hardly, in some cases, on purchasers who have parted with value on the faith of an apparent ownership, which subsequently proves not real. But the inconvenience which might otherwise arise from this source, is very much diminished, both in the case of real and personal property by the well-settled principle, that the rightful owner will be estopped whenever his negligence gives occasion to the fraud practised on the purchaser. And when taken with this limitation, the rule that the right of property in chattels cannot be transferred unless on the ground of authority or title, is just and salutary in its operation."

out the carrier's consent, there is no doubt the right of stoppage is terminated. Whitehead v. Anderson, M. & W. 534, per Parke, B. That is the simplest case. The vendee gets possession, and that is enough.

The next case is where the vendee does not get the whole of the goods into his possession, but part of them only. Now in these cases the effect of terminating the right of the vendor to stop the remainder is less obvious, but at the same time it has been reduced to this very intelligible rule:—Where the taking of a part only of the goods was merely in the process of taking, and with a view to take the whole, the right to stop is gone. But where there is an intention to separate the part taken from the remainder, the right to stop the remainder is not gone. The taking of samples is an equivocal act, and the question is *quo animo* were they taken; and whether with the intention of taking actual possession of the whole, or only in order to see if the goods were disposable; Jones v. Jones, 8 M. & W. 442, per Parke, B. The authorities on this point were usefully reviewed in the late case of Tanner v. Scovell, 14 M. & W. 36; where the Court said,

"Before the time of the decision in Slubey v. Heyward, 2 H. Bl. 504, the subject of stoppage *in transitu* had not undergone the great consideration it has of late years; and hardly anything was held sufficient to determine the right unless there was an actual taking possession by the purchaser himself, by going and weighing the commodity or otherwise, and so taking manual possession of it. In all the subsequent cases in which part deliveries have been *held not to be sufficient to prevent the right of stoppage [*348] (there are several of them), the vendee meant to separate the part delivered from the remainder, and to take possession of that part only, and in most

of them the vendor concurred in that act. I may observe, that Taunton, J., in the case of Betts v. Gibbons, 2 Ad. & El. 57, 29 E. C. L. R., made an observation which is very justly questioned by Mr. Smith, in his book on Mercantile Law, viz., that 'a partial delivery is a delivery of the whole, unless circumstances show that it is not so meant.' Mr. Smith appends a quære to that dictum, and with very great reason. It will be found that the only two cases, so far as I have looked at them, which bear the semblance of an authority, that a mere part delivery is sufficient to put an end to the right of stoppage *in transitu*, are these, Slubey v. Heyward, and Hammond v. Anderson, 1 N. R. 69. In the case of Bunney v. Poyntz, 4 B & Ad., part delivery of a portion of a haystack, with intent to separate that from the remainder, was held not to be sufficient. In Jones v. Jones, 8 M. & W. 431, on the other hand, this Court held, that the vendee (who was assignee under a trust deed) took possession of part of the cargo, with the intention of obtaining possession of the whole, for the purposes of the trust, and therefore that such taking possession of part did put an end to the transit; but it was fully admitted in that case, that the mere delivery of part to the vendee, when he meant to separate that part from the remainder, did not put an end to the right to stop *in transitu*. The same doctrine is laid down in Miles v. Gorton, 2 C. & M. 504, and in Dixon v. Yates, 5 B. & Ad. 313, 27 E. C. L. R. There the vendee took samples, coopered and marked the casks in which the goods were, and sold them to different purchasers, one of whom obtained possession of a part; and yet it was held that the lien of the unpaid vendor still subsisted. If the [*349] vendee takes possession *of part, not meaning thereby to take possession of the whole, but to

separate that part, and to take possession of that part only, it puts an end to the *transitus* only with respect to that part, and no more: the right of lien and the right of stoppage *in transitu* on the remainder still continue. Besides the cases I have referred to, I have no doubt others may be found in which this doctrine is clearly established. The whole, in truth, depends upon the intention of the vendee."

In Wentworth v. Outhwaite, 10 M. & W. 451, several parcels of goods were purchased under one entire contract from Hill and Co., at Hull, by the consignee, living at Mickley, about thirty miles from Leeds. A part—two packages—were forwarded by the railroad to Leeds, and arrived on the 20th of August. One of these packages was taken to Mickley Mills by the consignee on the 23d of August. The remaining package was seized by the sheriff, the plaintiff, on the 11th of September. But in the mean time some remaining parcels, computed in the same contract, which were forwarded by water carriage to Boroughbridge, were stopped *in transitu*, on the 8th September, and it was contended for the defendants, that this had the effect of revesting in the consignor, at that time, *all* the parcels contained in that contract, [illegible]d, amongst others, that seized by the sheriff on the [illegible]th of September. In this case the Court held that [illegible] vendee had a right to retain that portion of the goods only which had reached their destination, and have therefore been actually delivered.

Where goods have not been paid for, there must be, as we have seen, either an actual or constructive delivery to the vendee, in order to put an end to the vendor's right of stoppage. What is a constructive delivery must mainly depend on the facts in each case.[1]

[1] The rule appears to be, that so long as anything remains to be

One of the latest authorities on this point is that of Lackington v. Atherton, 7 M. & Gr. 360, 49 E. C. L. R., where timber was deposited by one Tindal with [*350] the Dock Company, *and was entered in their books in his name. The defendant and one

done, in order to put the goods finally in the possession of the vendee, the transitus still continues. Thus, if the goods are taken by the vendee to the custom-house, and there entered in his own name, yet so long as the duties remain unpaid, the right of stoppage exists; Northey v. Craggs, 2 Esp. 613; Donath v. Broomhead, 7 Barr, 301; Mottram v. Heyer, 5 Denio, 663. So a delivery to a carrier or agent of the vendee, with a view to their being forwarded to him, will not determine the transitus; Stubbs v. Lund, 7 Mass. 453; Isley v. Stubbs, 9 Id. 65; Newhall v. Vargas, 13 Maine, 93, S. C. 15 Id. 314; Buckley v. Furniss, 15 Wendell, 137, S. C. 17 Id. 504; Hays v. Mouille, 2 Harris, 51; Hitchcock v. Cowell, 20 Wendell, 167, S. C. 23 Id. 611. But it would seem that where the goods are delivered to an agent of the vendee for sale or custody, and are subject to his order, and this delivery is all that is contemplated by the parties, and a new impulse is necessary to put them again in motion, the transitus is at an end; Dixon v. Baldwen, 5 East, 175; Dodson v. Wentworth, 4 Man. & Gran. 1080; Wentworth v. Outhwaite, 10 Mees. & Wels. 436; Van Casteel v. Booker, 2 Excheq. 708; Rowley v. Bigelow, 12 Pick. 307; Sawyer v. Joslin, 20 Vermont, 172; Frazier v. Hillard, 2 Strobhart, 309; and in Bolin v. Huffnagle, 1 Rawle, 11, it was held (two justices dissenting), that a delivery, for any object, to an exclusive agent of the vendee, puts an end to the right of stoppage, and hence that a delivery of goods on board of the vendee's own vessel, the master of which signs a bill of lading, by which they are to be delivered to the owner, is a final delivery, and the transitus no longer continues. The recent English cases, moreover, seem to incline to the same opinion; Van Casteel v. Booker, 2 Excheq. 708, per Parke, B., and in Turner v. The Trustees of Liverpool Docks, 6 Eng. Law & Eq. R. 507, the right of stoppage was saved only by the master of the vessel having given the vendors a bill of lading whereby the goods were to be delivered to them or to their assigns. It should, however, be remarked, that the decision in Bolin v. Huffnagle, is confessedly in opposition to that in Stubbs v. Lund, supra, and is cited with disapprobation, in Newhall v. Vargas, supra, and by Chancellor Kent, in 2 Com. 544.

Congreve, who had purchased from Tindal, sold to the bankrupts, and gave them a delivery order. If that order had been in the name of Tindal, all would have been right; there would have been a constructive delivery to the bankrupts, and the property would now have vested in their assignees. But the delivery order was in the name of persons who were strangers to the Company, namely, the defendant and Congreve, to whom there had been a sale by Tindal. "The question is, whether that order was a document which the Company was bound to obey. The Company were neither the servants nor the agents of the defendant and Congreve: they were the agents of Tindal, and the order in question was, in effect, no order at all upon them. It seems to me, on this short ground, that there was no constructive delivery to the bankrupts," per Tindal, C. J.

The same question arises in determining for which party a consignee holds good—for the vendor or the vendee—for on this depends whether they are in the possession of the one or the other, and therefore whether the right of stoppage be gone. The case of Tanner v. Scovell mooted this point: the holder of the goods was a wharfinger, and although he had been directed to deliver to the insolvent vendee, and had obeyed his order, and had delivered a part of the goods, still it was held, that as he, the wharfinger, had never transferred the goods in his books from the one name to the other, and there being no other evidence *that he held for and was employed by the vendee*, there was no constructive possession by him; see also Dodson v. Wentworth, 4 M. & Gr. 1080, 43 E. C. L. R., and Dixon v. Baldwen, 5 East, 175. There must be some express contract to that effect, in order to convert a carrier into an agent for the consignee, or some evi-

dence from which it can be implied, and such contract [*351] must be distinct from the *original one for carriage as a carrier, but to hold the goods in a new character for the purpose of custody; Whitehead v. Anderson, 9 M. & W. 535, 518; and see instances in Foster v. Frampton, 6 B. & C. 107, 13 E. C. L. R.; Ellis v. Hunt, 7 T. R. 46.

Notice to stop *in transitu* must be given by the person who has a right to stop to the person who has the immediate custody of the goods; Whitehead v. Anderson.[1]

Mr. Smith states the duties incumbent on the vendee to be, first to accept them, and, secondly, to pay for them. If he refuse to accept them, the vendor, having performed all conditions precedent on his part, may sue him, either specially upon his contract,(*a*) or (if the property have passed to the vendee) for goods bargained and sold; in which latter form of action he will recover his entire price, while, in the special form, he will recover but the amount of damage actually sustained by himself.(*b*)

(*a*) See Boorman v. Nash, 9 B. & C. 145, 17 E. C. L. R.; Greaves v. Ashlin, 3 Camp. 426; Boyce v. Warburton, 2 Camp. 480; Spaeth v. Hare, 9 M. & W. 327.

(*b*) Hankey v. Smith, Peake, 42, et notas. The measure of this damage is the difference between the market price and the contract price on the day of tendering the goods for acceptance. Philpotts v. Evans, 5 M. & W. 475. As to the measure of damages for not accepting stocks, see Hecksher v. Gregory, 4 East, 607; Bordenave v. Gregory, 5 East, 107: for not replacing it, Shepherd v. Johnson, 2 East, 21; M'Arthur v. Lord Seaforth, 2 Taunt. 257; and see 7 Geo. 2, c. 8, s. 11; Tate v. Wellings, 3 T. R. 531.

[1] In Bell v. Moss, 5 Wharton, 189, the notice of stoppage of certain goods at sea, was given to the assignees of the consignee, who had become insolvent, and this was held to preclude them from taking possession of the cargo on its arrival. But in Mottram v. Heyer, 5 Denio, 663, notice to the carrier was considered essential to the stoppage.

"If the goods are to be delivered at a stipulated place, the vendor, before suing for the price, must tender them there, unless, indeed, the vendee have refused or put it out of his own power to complete his contract. If there be no stipulated place, it is the vendee's *business to fetch them.(a) Where the goods are to be forwarded by a carrier, the [*352] vendor must enter them, so that the carrier may be responsible for their value if lost.(b)

"If the goods were to be of a particular description, they must be such as to correspond with that description;(c) *ex. gr.* with the sample, if they were sold by sample, (d) in which case the vendee has a right to inspect and compare before receiving them, and may, if prevented from doing so, rescind the contract.(e)

"If the goods have been delivered, and the vendee, after that, neglect to pay the price, the vendor may recover it, in an action for goods sold and delivered; nay, there are instances in which he has been allowed to waive the tort, and recover in this form of action, against one who had wrongfully and fraudulently

(a) Glazebrook v. Woodrow, 8 T. R. 366; Jones v. Berkeley, Dougl. 687. See Rawson v. Johnson, 2 East, 203; Callonel v. Briggs, 3 Sal. 112.

(b) Clark v. Hutchins, 14 East, 475.

(c) Tye v. Finmore, 3 Camp. 462, where it was held that in a case of written contract, it is not enough that there be a correspondence with the sample, if there be a variance from the written description. (Haydon v. Hayward, 1 Camp. 108; Ellis v. Hamlin, 3 Taunt. 52.) See Flight v. Booth, 1 Bing. N. C. 370, 27 E. C. L. R.; Robinson v. Musgrove, 2 M. & R. 92, 17 E. C. L. R.; Dykes v. Blake, 4 Bing. N. C. 463, 33 E. C. L. R.; and Dobell v. Hutchinson, 3 Ad. & Ell. 355, 30 E. C. L. R., for an exposition of this doctrine, as applied to cases of real property: the question in such cases is, was the part of the contract which the vendor has broken, a *condition precedent?*

(d) Hibbert v. Shee, 1 Camp. 113.

(e) Lorymer v. Smith, 1 B. & C. 1, 8 E. C. L. R.

gained possession of them.(*a*)[1] But he cannot recover in *assumpsit before the time of credit, if there [*353] be one, has expired, although the fraud of the defendant be such as would entitle him to rescind the contract, and bring trover for the goods immediately.(*b*)

"It sometimes happens that there is such a difference between the goods delivered and their description in the bargain as would have justified the vendee in refusing to receive them; notwithstanding which he has taken them into his possession, and made use of them. In such a case it has been thought, that his conduct would be taken to amount to a confession that the vendor had performed his contract, and that he would be obliged to pay the whole price stipulated.(*c*)

"And, indeed, it has been held, that where the vendee had expressly stipulated that they should be returned if not approved of, his keeping them an unreasonable time precluded him from doing so.(*d*) But there are some cases in which it would be impossible, or very difficult, to return the goods; for instance, where they consist of bricks and timber put together

(*a*) Hill v. Perrott, 3 Taunt. 274; Biddle v. Levy, 2 Stark. 20, 3 E. C. L. R., per Gibbs, C. J., Sed vide B. N. P. 130; Lee v. Shore, 1 B. & C. 94; 8 E. C. L. R.; Lucas v. Godwin, 3 Bing. N. C. 741, 32 E. C. L. R.

(*b*) Ferguson v. Cadrington, 9 B. & C. 59, 17 E. C. L R.; Shutt v. Smith, 4 Tyrrh. 1019. See De Symonds v. Minchwick, 1 Esp. 430; Reed v. Hutchinson, 3 Camp. 352.

(*c*) Grimaldi v. White, 4 Esp. 95; Fisher v. Samuda, 1 Camp. 190; Groning v. Mendam, 1 Stark. 257, 2 E. C. L. R.; Hunt v. Silk, 5 East, 449. Sed quære, for it seems mere evidence by admission; et vide Allen v. Cameron, 1 Cr. & Mee. 837. See Campbell v. Fleming, 1 A. & E. 40, 28 E. C. L. R.

(*d*) Beverley v. Lincoln Gas Light Company, 6 A. & E. 829, 33 E. C. L. R.; Bianchi v. Nash, 1 M. & W. 545.

[1] See supra, note to page 300, 302.

in the shape of a building; or the breach of contract may not have been discovered till the articles have been received and used by the vendee. In such a case it was formerly thought that the vendor ought to recover the whole price, and the vendee to bring a cross action for the breach of contract.(*a*) It now, however, is *agreed, that the vendee may, in the action by the vendor, give evidence of the [*354] breach of contract, and that the vendor shall not recover more than the value of the benefit which the vendee has actually derived; and therefore, where there has been no benefit derived, shall recover nothing at all."(*b*)[1]

IV. WARRANTIES.

Warranties are either express or implied. In express warranties the vendor guarantees certain qualities in the subject of sale on certain conditions relating to it. They need not be in writing, for every statement at the time of a sale of a personal chattel is a warranty, if it appear to have been so intended. Richardson v. Brown, 1 Bing. 344, 8 E. C. L. R.

(*a*) Broom v. Davis, 7 East, 480, in nota.

(*b*) See Farnsworth v. Gerrard, 1 Camp. 38; Basten v. Butter, 7 East, 484; Okell v. Smith, 1 Stark. 107, 2 E. C. L. R.; Allen v. Cameron, 1 Cr. & Mee. 837; Chappel v. Hicks, 4 Tyrrwh. 44; Cousins v. Padden, 4 Dowl. 492; Grounsel v. Lamb, 1 M. & W. 352. The action of the vendor ought to be *indebitatus assumpsit* for the labour he has performed, not on the special contract, ibid. In Thornton v. Place, 1 M. & R. 218, 17 E. C. L. R., Mr. J. Parke said, that where work, agreed to be done according to a specification, varied from that specification, the plaintiff could not recover either the specified price or the actual value, but must recover the specified price, subject to a deduction of the sum which it would take to alter the work, so as to make it correspond with the specification.

[1] See supra, note to page 77.

Shepherd v. Kain, 5 B. & Ald. 240, 7 E. C. L. R.; Power v. Barham, 4 Ad. & Ell. 473, 31 E. C. L. R.[1]

In general, any breach of warranty entitles the party to bring an action upon the breach of warranty, but not to return the article or rescind the contract in case the thing sold has been *accepted*. The buyer is entitled to a trial, and may retain the articles warranted within a reasonable time for such trial, but not afterwards, as *we have already seen in treating of the doctrine of acceptance (ante, p. 71), and see Street v. Blay, 2 B. & Ad. 460; and Jordan v. Norton, 4 M. & W. 155.[2]

[*355]

Where wilful fraud is discovered, a contract, as we have seen, is avoided, even after acceptance, but not otherwise. Manifest defects contemplated by the parties on the principle of *haud enim decipitur qui scit se decipi* are supposed to be excluded even from the express terms of a warranty. But in other cases the vendee may maintain an action for the deceit, in which he must allege a *scienter*, and show that the description was false within the knowledge of the seller. See judgment of Tindal, C. J., in Budd v. Fairmaner, 8 Bing. 53, and see ante, p. 137, note (*a*).

[1] Foster v. Caldwell, 18 Vermont, 176; Hillman v. Wilcox, 30 Maine, 170; Morrill v. Wallace, 9 New Hampshire, 111; Carley v. Wilkins, 6 Barbour's S. C. R.; Bradford v. Bush, 10 Ala. 386.

[2] The whole of the law, on both sides of the Atlantic, with respect to warranties of chattels and the purchaser's right to defend from payment of the contract price, will be found in the notes to Chandelor v. Lopus, 1 Smith's Leading Cases, 211, 4th Am ed., and to Cutter v. Powell, 2 Id. 38. I could do little more than condense the remarks there made, and the subject is so extended and so full of distinctions, that the student had better refer, in the first instance, to the authorities as there classified. It is proper to add, that so far as it goes, the note of the English editor, supra, correctly states the result of the decisions in that country.

Warranties were held to be implied wherever the established and known custom, or the manner of dealing in a particular trade, naturally include them. (Jones v. Bowden, 4 Taunt. 847) : such as that the goods sold shall be of merchantable quality (Laing v. Fidgeon, 6 Taunt. 108, 1 E. C. L. R.) But this doctrine is somewhat qualified by more recent judgments, and the law now is, that, if a party purchase an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, the transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for the purpose for which it was designed : as, for instance, where A., a wine merchant, ordered a crane rope of B., a dealer in, and who represented himself as a manufacturer of ropes, and B.'s foreman thereupon ascertained the nature and dimensions of the rope required, and, being told that it was wanted to raise pipes of wine from the cellar, said, that a rope must be made on purpose (Brown v. Edgington, 2 M. & Gr. 279, 40 E. C. L. R.) *But in Olivant v. Bayley, 5 Q. B. 288, where the defendant had ordered a two-colour printing machine on the plaintiff's patent principle, and the plaintiff furnished it, it was held that there was no implied warranty that it should answer the purpose, it being a "known, ascertained article," which it might be supposed that the purchaser had previously examined; "but that if it was not a known, ascertained article, and the defendant ordered *a machine* for printing two colours, and the plaintiff undertook to supply it, he could not recover the price, unless the machine sup- [*356]

plied was reasonably fit for the purpose for which it was ordered." And this decision is perfectly reconcilable with that of Shepherd v. Pybus, 3 M. & Gr. 868, 42 E. C. L. R., and Bluett v. Osborne, 1 Stark. N. P. C. 384, 2 E. C. L. R.; Parkinson v. Lee, 2 East, 314; and Chanter v. Hopkins, 4 M. & W. 399; Jones v. Bright, 5 Bing. 533, 15 E. C. L. R.; from which the general inference is, that, where the purchaser has had a full opportunity of examining the article purchased for himself, there is no implied warranty that the thing sold shall answer the purpose for which it is bought; but otherwise, where the purchaser has not had such opportunity.

This doctrine is more than borne out by the judgment in the recent cases of Hart v. Windsor, 12 M. & W. 68, and Sutton v. Temple, 12 M. & W. 64, which related to a demise of *land*, in itself distinguishable from contracts respecting chattels, but in which the law relating to them was nevertheless declared, and the cases of Smith v. Marrables, 11 M. & W. 5, qualified, whilst other previous cases were expressly overruled. Hart v. Windsor and Sutton v. Temple properly belong to the law of landlord and tenant:(*a*) the judgments in those cases, however, illustrate the [*357] rule now in force. *It must be premised that Smith v. Marrables (following the decisions given in Edwards v. Etherington, R. & M. 268, 21 E. C. L. R., and Collins v. Barrow, 1 M. & R. 112, 17 E. C. L. R.) had determined that it is an implied condition in the letting of a house, that it shall be reasonably fit for habitation; and that if it be not (*e. g.* where it is greatly infested with bugs), the tenant may quit it without notice. And this is law; for the case is

(*a*) A branch of law distinct from that of contracts, though sometimes improperly classed with it.

clearly distinguishable from demises of land, for the letting of the goods and chattels, as well as the house, implies that the party who lets it so furnished is under an obligation to supply the other contracting party with whatever goods and chattels may be fit for the use and occupation of such a house according to its particular description, and suitable in every respect for his use. "Suppose it turn out," said the Lord Chief Baron in the case of Sutton v. Temple, 12 M. & W. 61, "that there is not a bed in the house, surely the party is not bound to occupy it, or to continue in it. So also in the case of a house infested with vermin, if bugs be found in the beds, even after entering into possession of a house, the lodger or occupier is not bound to stay in it. Suppose, again the tenant discover that there are not sufficient chairs in the house, or that they are not of a sort fit for use, he may give up the possession of the house."

It is otherwise with respect to demises of *land*. In that case the general rule of law is, "that where a man undertakes to pay a specific rent for a piece of land, he is obliged to pay that rent, whether it answer the purpose he took it for or not." Per Abinger, C. B., in Sutton v. Temple. The law merely annexes to the demise a condition of title in the lessor, and of security against eviction to the lessee. Hart v. Windsor and Smith v. Marrables, however, taken together, best exhibit the distinction. Both were cases of the demise of a house, both were unfit for occupation, and both *from the same unforeseen cause.(*a*) In the one (Smith v. Marrables) it was held that there *was* an implied warranty of fitness, because the subject of demise was that of goods and chattels, it [*358]

(*a*) Both houses swarmed with bugs.

being a furnished house, in which the defect was not apparent. In Hart v. Windsor there was held to be no implied warranty, because there was no demise of goods or chattels, it being an unfurnished house, and therefore a demise of land only, there being an implied contract only as to the estate itself, and not as to the condition of the property. The learned judgment in Hart v. Windsor should be referred to, and attentively studied on this subject. It is, however, foreign to the object of this work.

V. DEBTS.

A debt implies a contract to pay, of which the parties are the debtor and creditor. It is the debtor's duty to tender payment by an actual production of the money to the creditor, unless the latter declares that he will not accept it: it must also be unconditional. The duty of the creditor is to receive the payment.

The subject of contracts of debts are nearly as numerous as contracts themselves. They range, however, under a few general heads: thus goods sold and delivered, goods bargained and sold, are the subjects of debt; so are money paid to the use of another, money lent, and work and labour done. Debts involve the same rules as other contracts. As regards the appropriation of payments, some little difference arises.

When the payer is indebted in more ways than one to the payee, the rule is, "Where a creditor receives without objection what is offered by his debtor, *solvitur in modum solventis.*" Where the creditor objects, [*359] **recipitur in modum recipientis.*" Per Tindal, C. J., Webb v. Wetherby, 1 Bing. N. C. 502, 27 E. C. L. R.

Where there is an account current between the parties, the presumption is, that it was their intent to apply the first item on the credit side to the first on the debtor side; and thus when there is no express appropriation, the law appropriates the payment to the earlier debt.[1]

The creditor must, on his part, receive payment when it is offered to him, and give a receipt.

However strong evidence a receipt may be, it is no conclusive[2] proof of payment (Stratton v. Rastall, 2 T. R. 366; Sampson v. Corke, 5 B. & A. 611), unless by deed, as then no contrary evidence is admitted by law (Gilb. L. Ev. 142). A receipt in full of all demands was once conclusive, without there were mistakes (Alner v. George, 1 Camp. 392; Bristow v. Eastman, 1 Esp. 172); but this doctrine cannot be maintained, and it must be used as proof to be submitted to the jury, and capable of being rebutted (Benson v. Bennett, 1 Camp. 394). 3 & 4 W. 4, c. 23, enacts that no stamp is needed for any receipt under 5*l.*; but other receipts do require them, and after they have been written cannot be stamped (23 Geo. 3, c. 49, s. 14), unless under a period of fourteen days, and then on paying 5*l.* and the duty, or one calendar month, by paying the duty and 10*l.* (55 Geo. 3, c. 55, s. 11.)

VI. BAILMENTS AND CARRIERS.

Sir William Jones thus defines Bailments:—

"1. Bailment is a delivery of goods in trust, on a contract, express or implied, that the trust shall be

[1] See the subject of the application of payments considered in the note to the Mayor of Alexandria v. Patten, 1 Amer. Lead. Cas. 273.

[2] See supra, the note to page 16.

duly executed, and the goods redelivered, as soon as the time, or use, for which they were bailed, shall have elapsed or be performed.

[*360] *"2. Deposit is a bailment of goods to be kept for the bailor without a recompense.

"3. Mandate, is a bailment of goods without reward, to be carried from place to place, or to have some act performed about them.

"4. Lending for use, is a bailment of a thing for a certain time, to be used by the borrower without paying for it.

"5. Pledging, is a bailment of goods by a debtor to his creditor, to be kept till the debt be discharged.

"6. Letting to hire is, 1, a bailment of a thing to be used by the hirer for a compensation in money; or 2, a letting out of work and labour to be done, or care and attention to be bestowed, by the bailee, on the goods bailed, and that for a pecuniary recompense; or 3, of care and pains in carrying the things delivered from one place to another, for a stipulated or implied reward.

"7. Innominate bailments, are those where the compensation for the use of a thing, or for labour and attention, is not pecuniary; but either, 1, the reciprocal use, or the gift of some other thing; or, 2, work and pains reciprocally undertaken; or, 3, the use or gift of another thing in consideration of care and labour, and conversely.

"8. Ordinary neglect, is the omission of that care which every man of common prudence, and capable of governing a family, takes of his own concerns.

"9. Gross neglect, is the want of that care which every man of common sense, how inattentive soever, takes of his own property.

"10. Slight neglect, is the omission of that diligence

which very circumspect and thoughtful persons use in securing their own goods and chattels.

"11. A naked contract, is a contract made without consideration or recompense.

"II. The rules which may be considered as [*361] axioms flowing from natural reason, good morals, and sound policy, are these:—

"1. A bailee, who derives no benefit from his undertaking, is responsible only for gross neglect.

"2. A bailee, who alone receives benefit from the bailment, is responsible for slight neglect.

"3. When the bailment is beneficial to both parties, the bailee must answer for ordinary neglect.

"4. A special agreement of any bailee to answer for more or less, is in general valid.

"5. All bailees are answerable for actual fraud, even though the contrary be stipulated.

"6. No bailee shall be charged for a loss by inevitable accident or irresistible force, except by special agreement.

"7. Robbery by force is considered as irresistible; but a loss by private stealth is presumptive evidence of ordinary neglect.

"8. Gross neglect is a violation of good faith.

"9. No action lies to compel performance of a naked contract.

"10. A reparation may be obtained by suit for every damage occasioned by an injury.

"11. The negligence of a servant, acting by his master's express or implied order, is the negligence of the master." (Jones on Bailments, 117–120.)

These definitions and rules sufficiently explain the nature of a class of undertakings and their responsibility, which, though they originate in a contract, result, when broken, in cases of tort, for which a

remedy is sought by an action upon the case: this is not the province of a work confined to contracts.

It may be useful, nevertheless, to mention, that a common carrier is, at common law, an insurer of the property intrusted to him, and is answerable for every loss or *injury happening to it while in his cus- [*362] tody, from whatsoever cause arising, the acts of God and the Queen's enemies alone excepted. In all other cases his faultlessness is no discharge from his liability for any such damage up to the time of delivery of the goods according to his instructions; but if after their arrival at their destination, he agrees to hold them as wharfinger or warehouseman, his liability then depends upon such new contract; Cairns v. Robins, 8 M. & W. 58; see also Gatliff v. Bourne, 4 Bing. N. C. 332, 33 E. C. L. R.

The liabilities thus arising have been qualified in certain cases by the 11 Geo. 4, and 1 Wm. 4, c. 68, which enacts that no common carrier *by land*, for hire, shall be liable for the loss or injury to any gold or silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewelry, watches, clocks, time-pieces, trinkets, bills, bank-notes, order-notes, or securities for payment of money, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass (Owen v. Burnet, 2 Cr. & M. 353), china, silks, manufactured or unmanufactured, wrought up or not wrought up with other materials, furs (on the question of what falls within this denomination, see Mayhew v. Nelson, 6 C. & P. 59, 12 E. C. L. R.), or lace contained in any parcel, when the value exceeds the sum of 10*l.*, unless at the time of delivery at the office, warehouse, or receiving house (Syms v. Chaplin, 5 A. & El., 642, 31 E. C. L. R.), the value and nature of the article shall have been declared, and the in-

creased charges, or an engagement to pay the same, accepted by the person receiving the parcel. By sect. 2, common carriers, on the delivery of such parcels exceeding the value of 10*l.*, and so declared as aforesaid, may demand an increased rate of charges, which is to be notified by a notice in legible characters affixed in the office; and persons sending parcels are to be bound by such notice, without further proof of the same having come to their *knowledge. By sect. 3, carriers shall, if required, give a receipt for the [*363] parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and carriers who do not give such receipt when required, or affix the proper notice, are not entitled to the benefit of this act. Carriers cannot *by a notice* limit their liability at common law to answer for the loss of any articles in respect whereof they are not entitled to the benefit of this act: sect. 4. Every office of such common carrier shall be deemed a receiving-house; any one proprietor shall be liable to be sued, and no action shall abate for the want of joining any co-proprietor: sect. 5. Special contracts are not to be affected by this act: sect. 6. Parties entitled to damages for parcels lost or damaged, may recover the extra charges for insurance: sect. 7. This act does not protect any such common carrier from liability to answer for any losses or injury, arising from the felonious acts of any servant in his employ; nor does it protect any such servant from liability to answer for the consequences of his own neglect or misconduct: sect. 8. Common carriers are not concluded as to the value of any parcel by the value declared: sect. 9. Money may be paid into court by common carriers in the same mode, and with the same effect, as money paid into court in any other action: sect. 10. Not-

withstanding this act, it was considered that the carrier was still liable for *gross negligence*, although he might have affixed in his office such a notice as the act requires, and although the articles lost by his misconduct might be of such a description as to require a declaration of value and payment of increased charges, which their owner had, however, neglected to make in respect of them. See the judgment of the Court in Owen v. Burnett, 2 Cr. & M. 353; and see Wyld v. Pickford, 8 M. & W. 443, which decides, that negligence must be replied to a plea of the notice.

The carrier is no longer liable for the loss of the [*364] *articles named in the statute, occasioned even by the gross negligence of his servant, where such articles have not been insured; see Hinton v. Dibdin, 2 Q. B. 646, 42 E. C. L. R.; where all the cases upon the remaining liability of carriers under the statute, will be found elaborately reviewed in the judgment.[1]

VII. GUARANTEES.[2]

A Guarantee is a promise to answer for the debt of another, or for his performance of some duty or undertaking for which he is liable. We have already amply discussed the bearing of the Statute of Frauds on guarantees, which it requires to be in writing, and signed by the party to be thereby charged.

The guarantor's liability depends on the terms of his guarantee. The chief difficulty is to distinguish between continuing guarantees and those which are not

[1] See the notes to the case of Coggs v. Bernard, in 1 Smith's Leading Cases, 254–265.

[2] See supra, the notes to page 56, and those to Lent v. Padelford; 2 American Leading Cases, 25.

continuing. Wherever the guarantor does not expressly confine his liability to a single or to certain specific transactions, it is generally a continuing guarantee, for if a party means to confine his liability, he should take care to say so. See Merle v. Wells, 2 Camp. 413, per Lord Ellenborough, C. J.

The following have been held to be continuing guarantees:

"To A. B. I have been applied to by C. D., to be bound to you for *any* debts he may contract, not to exceed 100*l.*, in his business as a jeweller. I consider myself bound for *any* debt he may contract, etc." Merle v. Wells, 2 Camp. 413.

"If you will credit A. B., I engage that his payments shall be regularly made from this day, &c." Simson v. Manley, 2 C. & J. 12, 13, note.

And a bond conditional for the payment "of all such sums, not exceeding 200*l.*, as the plaintiffs should advance *for or on account of bills from time to time drawn by B. on plaintiffs, within three [*365] calendar months after receiving notice to pay such sums, has been held to be a continuing security." Batson v. Spearman, 9 Ad. &. E. 298, 36 E. C. L. R.

"In consideration of your extending the credit already given to A., and agreeing to draw upon him at three months from the first of the following month, for all goods purchased up to the 20th of the preceding month; I hereby guarantee the payment of any sum that shall be due and owing to you upon this account for goods supplied." Hitchcock and another v. Humfrey, 5 M. & G. 559, 44 E. C. L. R.

"In consideration of your supplying C. with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof to the amount of 200*l.*" Mayor v. Isaac, 6 M. & W. 605.

"In consideration of your agreeing to supply goods to K. at two months' credit, I agree to guarantee his present or any future debt with you, to the amount of 60*l.* Should he fail to pay at the expiration of the above credit, I bind myself to pay you within seven days from the date of receiving notice from you." Martin v. Wright, 6 Q. B. 917, 51 E. C. L. R.

"As you are about to enter upon transactions in business with Messrs. C. (with whom you have already had dealings), in the course of which they may be from time to time largely indebted to you; in consideration of your doing so, I hereby agree to be responsible to you for, and guarantee to you the payment of, any sums of money from that firm, whether it consist of the same members as at present, or others, now, is, or may at any time be indebted to you, so that I am not called upon to pay more than the sum of 2000*l.*;" Johnstone v. Nicholls, 1 C. B. 251, 50 E. C. L. R.

[*366] *The following, on the contrary, have been held to be not continuing guarantees:

"Messrs. Allnut and Arbouin,

"50 Mark Lane,

"Sirs,—I hereby guarantee Mr. John Jennings's account with you for wines and spirits, to the amount of 100*l.*

(Signed) "E. ASHENDEN.

"SITTINGBOURNE, April 14th, 1838."

At the time when the defendant gave and signed this guarantee, addressed to the plaintiffs, the only account between Jennings and the plaintiffs was that for the spirits supplied, to the amount of 83*l.* 1*s.*, the supply of spirits being the only transaction which the

plaintiffs and Jennings had had together prior to the time when this guarantee was given; Allnut v. Ashenden, 5 M. & Gr. 392, 44 E. C. L. R.

"I hereby agree to be answerable to K. for the amount of five sacks of flour to be delivered to W. T., payable in one month;" Kay v. Greaves, 6 Bing. 276, 19 E. C. L. R.

"I hereby agree to be answerable for the payment of 50*l.* for T. L., in case he does not pay for the gin, &c., he receives from you, and I will pay the amount;" Nicholson v. Paget, 1 Cr. & Mee. 48.

On the construction of guarantees, see further, Dimmock v. Sturla, 14 Mees. & Wels. 758.

Where the construction of the guarantee is determined, the surety is of course liable to its full extent, in case of the failure of the party to discharge his own liability, which liability, as we have already seen, continues, that of the guarantor being merely collateral; and if the creditor were to enter into any arrangement whereby he discharged the principal from his liability, he would, *de facto*, discharge the surety from *his also: equally so if he prolonged the surety's responsibility by giving time to the debtor; but this is again subject to the qualification of ordinary forbearance; Goring v. Edmonds, 6 Bing. 94, 19 E. C. L. R.; Muskett v. Rogers, 5 Bing. N. C. 728, 35 E. C. L. R.; any express stipulation to the contrary excepted; Holt v. Hadley, 2 Ad. & El. 758, 29 E. C. L. R. Express consent likewise on the part of the surety will, where it exists, enable the creditor to discharge the debtor; Cowper v. Smith, 4 M. & W. 519. These rules result from a principle thus explained by Pothier: "The extinction of the principal obligation necessarily induces that of the surety, it being of the nature of an accessory obliga- [*367]

tion, that it cannot exist without its principal; therefore wherever the *principal* is discharged, in whatever manner it may be, not only by actual payment or a compensation, but also by a release, the surety is discharged likewise; for the essence of the obligation being that the surety is only obliged on behalf of the principal debtor, he, therefore, is no longer obliged when there is no longer any principal debtor for whom he is obliged. In like manner the surety is discharged by the novation of the debt; for he can no longer be bound for the first debt for which he was a surety, since it no longer subsists, having been extinguished by the novation; neither can he be bound for the new debt, into which the first has been converted, since this new debt was not the debt to which he acceded."

Should any condition, express or implied, that has been imposed upon the creditor by the guarantee be omitted by him, the surety will, of course, not be liable; Glynn v. Hertel, 8 Taunt. 208, 49 E. C. L. R. The engagement too would be vitiated and voided by any fraud. For by the concealing some material part, for instance, of the principal's original contract from the surety, the engagement would become so vitiated and avoided; Pidcock v. Bishop, 3 B. & C. 605, 10 E. C. L. R.

The principle to be drawn from the cases, as in that [*368] of *Stone v. Compton (5 Bing. N. C. 156, 35 E. C. L. R.), as laid down by Tindal, C. J., is this: "that, if with the knowledge or assent of the creditor any *material part* of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such that, but for the same having taken place, either the suretyship would not have been entered into at all, or being entered into, the extent of the surety's liability might

be thereby increased, the security so given is voidable at law on the ground of fraud."

The death of a testator would release the executor from being liable for advances after his decease, as operating as a revocation (Potts v. Ward, 1 Marsh. 366, 4 E. C. L. R.) So would any alterations which were made by creditor and principal of the terms of the original agreement without the express assent of the surety, however slightly the new terms may vary from the old ones in any material point, for the surety is bound only by the precise terms of the agreement he has guarantied. (Warre v. Calvert, 2 Nev. & Per. 126.) So, also, if the transactions are of a different nature to those which form the subject of the guarantee, as, for instance, the substitution of a loan for a sale of goods; see Evans v. Whyle, 5 Bing. 485, 15 E. C. L. R.; Glynn v. Hertel, 8 Taunt. 208, 4 E. C. L. R.; see also Whitcher v. Hall, 5 B. & C. 267, 11 E. C. L. R.

The surety, however, is nowise discharged by the debtor being trusted to a larger amount than specified in the guarantee.

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